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NO. 22289

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EMMETT GANGWER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
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NO. 22914

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APPELLEE'S BRIEF

I

STATEMENT OF THE CASE AND JURISDICTION

This is an appeal of a judgment of conviction entered by the United States District Court for the Central District of California upon jury verdicts of guilty on Counts One, Two, Four, Five and Six of a six-count indictment charging unlawful concealment and sale of marihuana, 21 U.S.C. §176(a).[1/]

1/ Title 21 U.S.C. §176(a) provides:

". . . Whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or (continued)

Jurisdiction to review the judgment of conviction below is conferred upon this Court by Title 28, United States Code, §§ 1291 and 1294.

II

STATEMENT OF FACTS

On December 19, 1966, federal narcotics agent Knapp was telephonically advised by government informant Van Noy that Knapp and the informant could purchase 5 kilograms of marihuana from defendant Gangwer on the same day [R. T. 39-40]. 2/ At 2:45 p.m., Knapp and Van Noy drove to Gangwer's apartment and met him [R. T. 40-41]. After introducing himself, Gangwer pointed to a box containing 4 1/2 kilogram-bricks of marihuana [R. T. 41-2, 51-2, 105-B]. Knapp had a conversation with Gangwer in which Gangwer said he could get marihuana in larger

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1/ (continued) in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury..."

2/ R. T. Reporter's Transcript.

quantities and set the price for the 4 1/2 kilograms of marihuana at $450 [R. T. 43]. Knapp handed Gangwer $450.00, took the marihuana, and departed with Van Noy [R. T. 43, 127].

On January 21, 1967, the informant Van Noy called Gangwer and arranged a second sale of marihuana [R. T. 47]. Agents Knapp and Downing then drove to 17361 Parthenia, Northridge, California, and met Gangwer [R. T. 47-8]. Gangwer took the agents into the backyard and showed them three boxes of marihuana (approximately 44 kilograms) [R. T. 48, 52-5, 108-110]. While Gangwer and Knapp were agreeing on the price ($75.00 per kilogram-brick), Agent Downing took two kilogram-bricks out of the boxes and returned to the government vehicle, ostensibly to check their weight [R. T. 49]. Shortly thereafter, Gangwer was arrested [R. T. 49]. A search of the premises at the time of the arrest resulted in the seizure of two kilogram-bricks of marihuana from Gangwer's vehicle [R. T. 54, 108-112].

Prior to the first transaction on December 19, 1966, the informant had spoken several times with Gangwer over the telephone after receiving Gangwer's number from one Mike Penneys [R. T. 145]. On the first telephone call, Gangwer agreed to sell marihuana to the informant although Gangwer had never met informant Van Noy [R. T. 146], Gangwer told Van Noy that he would be interested in future marihuana deals [R. T. 147]. Gangwer and the informant also discussed a pending LSD transaction of the defendant's, and whether or not the informant would "front" the money (pay for the marihuana in advance of delivery) [R. T. 149-

150]. Gangwer told Van Noy that he was connected with a large organization and that he was interested in regularly distributing large amounts of marihuana [R. T. 150]. Gangwer's only expressed reluctance to sell marihuana was because of his pending LSD transaction [R. T. 154].

The informant had originally been referred to Gangwer by Mike Penneys. Penneys told the informant that Gangwer was involved in an LSD transaction with Penneys and that Gangwer [R. T. 164] would sell marihuana to the informant [R. T. 164].

For the first time on the day of trial and without supporting affidavits, defendant sought a continuance for the purpose of contacting a witness, one Mike Penneys, whom the defendant for several weeks unsuccessfully had sought to locate and serve with a subpoena [R. T. 11]. Counsel represented that he expected Penneys' testimony would show that Penneys had agreed with the informant to involve Gangwer, and that Penneys was the "moving spirit behind [the transaction]." Counsel further stated that Gangwer spent 10 days in San Francisco looking for the witness [R. T. 11].

III

QUESTIONS PRESENTED

A. Did the trial court abuse its discretion in denying defendant's motion for a continuance?

B. Was the entrapment instruction given by the trial

court erroneous?

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR CONTINUANCE.

The granting of a continuance is within the discretion of the trial court. Absent a clear abuse of that discretion, the denial of a continuance is not subject to review.

Elkins v. United States, 266 F. 2d 588 (9th Cir. 1959);

Sherman v. United States, 241 F. 2d 329 (9th Cir. 1957);

Hutson v. United States, 238 F. 2d 167 (9th Cir. 1956);

Williams v. United States, 203 F. 2d 85 (9th Cir. 1953).

United States v. White, 324 F. 2d 814 (2nd Cir. 1963), and Scott v. United States, 263 F. 2d 398 (5th Cir. 1959), relied upon by Gangwer are inapposite. In White, the informant, a percipient witness, was unavailable due to illness, although his whereabouts were known. In Scott, a co-conspirator and percipient witness had been subpoenaed by the defendant, but failed to appear claiming illness. Here, however, the only agents of the Government involved in the transactions testified at the trial.

The witness sought by the defendant was entirely

unconnected with the Government. Moreover, the sole contact between informant Van Noy and the witness Penneys regarding the transaction with Gangwer was prior to the first of two transactions, where Penneys gave Van Noy Gangwer's name and telephone number as a possible source of marihuana [R. T. 145-6, 174].

Whether Penneys induced Gangwer to sell to the agent in this case is immaterial under these circumstances, since the entrapment defense does not extend to inducement by a private citizen who is unconnected with the Government.

United States v. De Alesandro, 361 F. 2d 694 (2nd Cir. 1966);

Gonzales v. United States, 251 F. 2d 298 (9th Cir. 1958);

See Notaro v. United States, 363 F. 2d 169, (9th Cir. 1966).

B. THE TRIAL COURT'S INSTRUCTION ON ENTRAPMENT WAS NOT PLAIN ERROR.

No exception to the Court's instruction was made by defendant in the trial court; neither did defendant state distinctly an objection to the court's instruction and his grounds. In fact, defense counsel specifically stated that the court's instruction correctly stated the law and that he saw no error in it [R. T. 205]. Counsel added that he preferred his requested instruction because it is longer and therefore places more emphasis on his entrapment

defense [R. T. 188].

Having failed to comply with the terms of the Federal Rules of Criminal Procedure, Rule 30, [4/] defendant is entitled to a reversal only if the instruction given constitutes plain error.

Nordeste v. United States, ___F. 2d___(9th Cir. 1968) (No. 21, 294, April 4, 1968);

Robison v. United States, 379 F. 2d 338 (9th Cir. 1967);

Reid v. United States, 334 F. 2d 915 (9th Cir. 1964).

Notaro v. United States, supra, and Pratti v. United States, 389 F. 2d 660 (9th Cir. 1968), require that an entrapment instruction includes a statement that defendant must be acquitted (1) if the jury entertains a reasonable doubt as to whether the defendant was entrapped, and (2) if the government fails to sustain its burden of proving beyond a reasonable doubt that defendant was not entrapped. The trial court's instruction in this case accurately

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4/ Rule 30 provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

charged the jury as to the burden and degree of proof [R. T. 263-4].

Defendant's requested instruction, on the other hand, is probably erroneous, as pointed out by the trial court [R. T. 204], since it fails to explain the burden of proof, and it introduces the often-criticized distinction between lawful and unlawful entrapment, e.g., United States v. Pugliese, 346 F. 2d 861 (2nd Cir. 1965), cited in Notaro v. United States, supra.

Although the issue is not mentioned in Notaro or Pratti, appellant asserts error occurred when the court failed to give a "specific" instruction on entrapment, citing Raffis v. United States, 364 F. 2d 948 (8th Cir. 1966) and Collier v. United States, 301 F. 2d 786 (5th Cir. 1962).

In Raffis, no error occurred when defendant's proffered "theory of defense" instruction was refused, since the instruction given adequately explained defendant's position. In dictum, the Court added that the "theory of defense" instruction "may be specific". 364 F. 2d at 956.

In Collier, the entrapment instruction was patently erroneous, and included a misstatement of the evidence. 301 F. 2d at 787. The case does not hold that it is plain error to give a "general" entrapment instruction.

Appellant's reliance on Sherman v. United States, 356 U. S. 369 (1958), is similarly misplaced. Sherman approves the long-standing rule that once entrapment is asserted, the Government is entitled to conduct an appropriate and searching inquiry into

the defendant's conduct and predisposition to commit the crime charged. 356 U S. at 372; Sorrells v. United States, 287 U. S. 435, 451 (1932).

Neither Notaro, Pratti, nor Sherman describes or requires an instruction containing a detailed description of the evidence required to prove predisposition. The trial court accurately and clearly charged the jury as to the burden and degree of proof necessary to show that defendant was not an unwary innocent regarding possession and sale of illegal drugs.

Appellant's only complaint, and one never adverted to by defense counsel at trial, is that the instruction given failed to specifically state that the defendant must be shown to have had a willingness to commit a crime "of the nature of the offense charged." In this regard, appellant claims certain evidence might have misled the jury, namely, Gangwer's prior possession of marihuana, a fact admitted by defendant, and Gangwer's conversations regarding a sale of LSD. It is submitted that the jury could not have been misled, since such conduct is probative on the issue of the defendant's predisposition to conceal, transport, or sell marihuana. See Sherman v. United States, supra; Sorrells v. United States, supra; Robison v. United States, supra at 346; Notaro v. United States, supra at 172; Reid v. United States, supra at 917; Whiting v. United States, 321 F. 2d 72, 77 (1st Cir. 1963), cert. denied, 375 U. S. 884; Carson v. United States, 310 F. 2d 558 (9th Cir. 1962).

Nordeste v. United States, supra, considers a similar

contention. For the first time on appeal, Nordeste contended that the use of the term "innocent person" in an entrapment instruction may have misled the jury into believing that entrapment is only available to one who is otherwise innocent. In affirming the conviction, the Court said:

> While it is preferable to avoid use of the term "innocent person" in an instruction on entrapment, we do not believe that, in the context of this particular instruction, the term rendered the instruction erroneous. The concept of unlawful entrapment has always been thought of as safeguarding one who is innocent of any preconceived intent to commit the crime charged, while denying protection to one who has a criminal intent and is ready to grasp an opportunity to fulfill that intent. We think the term was used in this sense in the instruction under consideration and that it was so understood by the jury.

Similarly, under the circumstances of the instant case, it is submitted that the instruction given was properly understood by the jury.

V

CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted,

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No. 22,290

IN THE

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JOHNS-MANVILLE SALES CORPORATION,
a Delaware corporation,

Appellant,

vs.

ELLSWORTH H. EWALD, aka E. H. EWALD,
dba EWALD CONTRACTING COMPANY, and
RELIANCE INSURANCE COMPANY, a Pennsylvania
corporation, as successor in interest to
Standard Accident Insurance Company,
a Michigan corporation,

Appellees.

OPENING BRIEF OF APPELLANT JOHNS-MANVILLE SALES CORPORATION

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OPENING BRIEF OF APPELLANT JOHNS-MANVILLE SALES CORPORATION

JURISDICTION

This action originated in the Arizona Superior Court, Maricopa County (TR 5-18) and was subsequently removed to the United States District Court for the District of Arizona, pursuant to 28 U.S.C.A. Sections 1441 and 1446. (TR 1-4). No defendants were citizens of Arizona and none of the defendants were citizens of Delaware, the State under whose laws the Appellant was incorporated (TR 1-4). The action was civil and an amount in excess of $10,000.00 was sought. (TR 6-8).

Summary Judgment against the Appellant and in favor of Appellee was entered on July 24, 1967. (TR 104-104A). In this judgment, the Honorable William P. Copple, United States District Judge for the District of Arizona, ordered that Appellant's Motion for Summary Judgment was denied, that Appellee's Motion for Summary Judgment was granted, that Appellant take nothing by its complaint as against Appellee and that Appellee recover its costs. (TR 104-104A).

Appellant then moved the Court for an order vacating its judgment and granting Appellant's Motion for Summary Judgment, or, alternatively, for an order granting a new trial or amending the judgment. (TR 108-13.) After this motion was denied, Appellant filed a notice of appeal on September 12, 1967, (TR 116.) and a Designation of Contents of Record on Appeal on September 28, 1967. (TR 121-22.) This Court has jurisdiction to hear this appeal by virtue of 28 U.S.C.A. § 1291.

STATEMENT OF CASE

Appellant, Johns-Manville Sales Corporation, instituted this action in the Superior Courts of Arizona, Maricopa County, to recover the sum of $15,252.00 from Appellee, Standard Accident Insurance Company, now merged with and known as Reliance Insurance Company. (TR 19.) The facts upon which Appellant's claim for relief was based were as follows:

One of the defendants in this action, Ellsworth H. Ewald, dba Ewald Contracting Company, entered into a contract for the construction of manhole and transit conduit ducts with Mountain States Telephone and Telegraph Company. (TR 13.) The work was to be performed on public property, *i.e.,* under city streets in Phoenix and Tempe, Arizona. (TR 36-46.) The contract was dated November 26, 1963 (TR 9) and provided, in relevant part, that:

Article 2

> The Contractor shall furnish all labor and perform all work, including temporary and permanent work, furnish all the necessary tools, equipment and material required for such work,

except such items of material as are specified in said Exhibit "A" to be furnished by the Telephone Company. The Contractor shall complete all work with promptness and diligence to the complete satisfaction of the Telephone Company. All material furnished by the Contractor shall be of the quality specified by the Telephone Company. (TR 9.)

Article 11

The Telephone Company shall have the right to require the Contractor to furnish, at the Telephone Company's expense, (such expense not to be included in the contract price), a bond covering the full and faithful performance of the contract and the payment of all obligations arising thereunder in such form as the Telephone Company may prescribe and with such surety as it may approve. (TR 11.)

In addition, a document entitled "SPECIFIC JOB CONTRACT", attached to the contract and marked Exhibit "A", provided, in part, that:

This is the Exhibit "A" referred to in the foregoing contract dated the Twenty-sixth day of November, 1963, between THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY and Ellsworth H. Ewald, an individual doing business as Ewald's Contracting Company. This Exhibit "A" consists of this sheet and the following described contract documents *which are attached hereto and made a part of the Contract:* Prints #1 through #4 of Job A-4-0602 (Project AS 929) Phoenix (Tempe) Arizona. Addendum to Article 6 of this Contract: Addendum to Article 13 of this Contract: Invitation to Bid Letter: *Award to Bid Letter:* and Contractor's Bid attached. (TR 13.) (Emphasis added.)

The "Award to Bid Letter" referred to above does not appear in the bound Transcript of Record; it is attached to the deposition of Samuel Beard as a portion of Exhibit 1 and was forwarded to the Court of Appeals in a separate volume by the Clerk of the District Court. It is dated November 26, 1963, and, after informing Ewald that his bid of $35,710.00 had been accepted, it provided that "A Performance and Payment Bond *will* be required." (Deposition of Samuel Beard, Page 11 and Exhibit 1 attached to the deposition.)

Pursuant to this contract between Mountain States and Ewald, Standard Accident Insurance Company, Appellee's predecessor, as surety, and E. H. Ewald, as principle, executed a Bond, No. B-205288, guarantying full performance of the contract by Ewald. The bond was also executed on November 26, 1963, (TR 17-18) the same date as the contract. (TR 9.) The obligee of this bond was Mountain States Telephone and Telegraph Company. The bond by reference expressly incorporated the contract between Mountain States and Ewald as though the same were fully set forth therein, and provided:

> WHEREAS, the above bounden Principal has entered into a certain written contract with the above-named Obligee, dated the 26th day of NOVEMBER, 1963 . . . which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.
>
> Now, Therefore, the condition of the above obligation is such, That if the above bounded Principal shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified, and shall pay over, make good and reimburse to the above-named Obligee, all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise, to be and remain in full force and effect. (TR 17.)

Appellant sold materials worth $15,252.00 to Ewald for use on the job which Ewald had contracted with Mountain States to perform but was never paid for these materials. (TR 59-60.) After demands for payment from Ewald and Appellee were rejected, Appellant commenced this action against Ewald, dba Ewald Contracting Company, Jane Doe Ewald and the surety on Ewald's bond, the Appellee. The Ewalds were never served with process so the only defendant upon whom Appellant obtained service was the Appellee, Reliance Insurance Company, the corporate successor of Standard Accident Insurance Company. After the issues had been joined, Appellee moved for Judgment on the

Pleadings (TR 25-35) and both parties moved for Summary Judgment (TR 55-65 and 66-76), Appellant so moving twice. (TR 77-79.)

The District Court, the Honorable William P. Copple presiding, entered judgment for Appellee on its Motion for Summary Judgment and against Appellant on its Motion on July 24, 1967. (TR 104-105.) He found that there were no genuine issues of material fact and that the Appellee was entitled to judgment as a matter of law. (TR 104.) It is from this judgment that Appellant brings this appeal.

QUESTIONS PRESENTED FOR REVIEW

1. Do the bond and the contract incorporated therein reveal an intent on the part of the parties thereto to benefit directly third persons such as the contractor's materialmen so that a materialman may sue on the bond as a third party beneficiary thereof?

2. Is the contractor's nonpayment of Appellant, the contractor's materialman, a breach of the contract, performance of which was guaranteed by the bond, so that Appellant may recover the contract price from the surety?

SPECIFICATION OF ERRORS

1. The District Court erred in denying Appellant's Motion for Summary Judgment against the Appellee (TR 104-104A) because the evidence before the Court was sufficient to require it to conclude, as a matter of law, that the bond and contract incorporated therein were intended by the parties thereto to benefit a third party such as Appellant, and Appellant, as a third party beneficiary of the bond, was entitled to judgment against Appellee.

2. The District Court erred in denying Appellant's Motion for Summary Judgment against Appellee (TR 104-104A) because there was sufficient evidence before the Court to require it to conclude, as a matter of law, that the contractor-principal's failure to pay Appellant was a breach of a condition of the bond, thereby rendering the surety (Appellee) liable to Appellant.

3. The District Court erred in granting Appellee's Motion for Summary Judgment against the Appellant (TR 104-104A) for the reasons set forth in Specifications 1 and 2, *supra.*

SUMMARY OF ARGUMENTS

1. The evidence before the Court was sufficient to establish, as a matter of law, that the bond and the contract incorporated therein were intended to benefit a third party, such as Appellant, who furnished supplies to the contractor-principal for use on the bonded job and Appellant was, therefore, entitled to recover on the bond as a third party beneficiary thereof.

2. The evidence before the Court was sufficient to establish, as a matter of law, that the contractor-principal's failure to pay Appellant, one of his suppliers, was a breach of a condition of the bond and Appellant was therefore entitled to recover from Appellee, the surety.

ARGUMENT

The parties are in agreement that if Appellant is entitled to recover on the performance bond on which Appellee is the surety, it must do so as a third party beneficiary of the bond and the contract incorporated therein. (TR 27-37.) The parties also agree that plaintiff's rights as a third party beneficiary of the bond and contract are to be determined by Arizona law, since the contract and bond were executed in Arizona and were to be performed there. (TR 27-37.) Consequently, Arizona law concerning third party beneficiaries and principals and sureties must be examined and, when necessary and appropriate, supplemented with law from other jurisdictions before the record can be critically reviewed.

The concept of a third party beneficiary with enforceable rights in a contract to which he was not a party was first enunciated by the Arizona Supreme Court in *Steward v. Sirrine,* 34 Ariz. 49, 267 Pac. 598 (1928). The Court stated there that:

> We think it is the well-settled rule of law that where a person agrees with another, on a sufficient consideration, to do a thing for the benefit of a third person, the third person may

> enforce the agreement, and it is not necessary that any consideration move from the latter. It is enough if there is a sufficient consideration between the parties who make the agreement. *Steward v. Sirrine, supra* at 58, 267 Pac. at 601.

The court did not elaborate as to what type of showing the putative third party beneficiary would have to make in order to avail himself of the third party theory. However, in the next case involving third party beneficiaries, *Treadway v. Western Cotton Oil and Ginning Co.,* 40 Ariz. 125, 10 P.2d 371 (1932), the Court held that in order to enforce a contract to which he was not a party, the third person must show that the contract was intended to benefit him directly. "Incidental benefit will not support the action." *Treadway v. Western Cotton Oil and Ginning Co., supra* at 139, 10 P.2d at 376. (Emphasis added.)

Six years after the *Treadway* case was decided, the Arizona Supreme Court handed down its decision in *Webb v. Crane Company,* 52 Ariz. 299, 80 P.2d 698 (1938). This case is similar in many respects to the instant case. It involved a suit by a subcontractor's materialman against the general contractor and his surety to recover on the contractor's performance bond. There, as in the instant case, the construction work was performed on public property. There, too, the materialman was suing to recover the contract price of goods which he had furnished for use on the job. The materialman in *Webb,* however, had furnished supplies to a sub-contractor, rather than the general contractor, as in the instant case.

The general contractor in *Webb* argued that the subcontractor's materialman could not sue on the bond because the bond was intended to benefit only the obligee named therein, the State of Arizona. The bond, he argued, was not intended by any party to it, the state as obligee, the contractor as principal, or the bonding company as surety, to benefit third persons such as the subcontractor's materialman. Consequently, the general contractor contended, third parties had no right to sue on it. He raised two additional arguments in support of his contentions. First there was

a "labor" bond as well as a performance bond given on this job. Therefore, the general argued, the fact that a labor bond had been given was evidence that neither the surety nor the obligee on either bond intended the performance bond to benefit materialmen of a subcontractor. In addition, the contractor argued that the performance bond was executed pursuant to a statutory requirement and that the legislative intent underlying the statute was to give only the state a right to sue on the bond.

The Court acknowledged that neither the construction contract nor the bond gave, "in express terms a direct right of action on the bond to materialmen . . . ." *Webb v. Crane Company, supra* at 304, 80 P.2d at 701. The Court noted, however, that the performance bond imposed a duty on the general to "promptly pay all . . . subcontractors and materialmen and all persons who shall supply such . . . subcontractors, with material, supplies or provisions for carrying on such work . . . ." *Webb v. Crane Company, supra* at 303, 80 P.2d at 701. This was persuasive evidence that the bond was intended to benefit these categories of third persons and neither of the contractor's other arguments to the contrary was nearly as persuasive. With respect to the first argument, the Court noted that the fact that the contractor had executed a labor bond which did not protect the materialman had no bearing on the materialman's right to sue on the performance bond. Insofar as the second argument was concerned, the Court examined the statute pursuant to which the performance bond was executed and concluded that it was impossible, from a reading of the statute, to ascertain any legislative intent with respect to the right of a third person, other than the state, to sue on the bond. Consequently, the Court resolved the issue by an analysis of the public policy considerations involved.

The Court noted that the materials had been furnished for use in the construction of public buildings. Next, the Court discussed the general rule that public buildings used for public purposes are not subject to the mechanic's lien law and could not, in Arizona, be liened by materialmen or contractors. Consequently,

mechanics and materialmen have a need for a remedy in lieu of the lien law. Stating that the following was a correct statement of the law, the Court quoted from an annotation in 77 A.L.R. to the following effect:

> The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, where the bond contains a condition for their benefit and is intended for their protection, although the public body is the only obligee named therein, and there is no expressed provision that such third parties shall have any rights thereunder, is affirmed by the great weight of authority. *Webb v. Crane Company, supra* at 310, 80 P.2d at 704.

Apparently basing this decision primarily on these policy considerations, the Court concluded that the performance bond was intended to protect "those who labored or furnished material on the addition to Taylor Hall, as well as the obligee mentioned therein, and was, therefore, a third party bond." *Webb v. Crane Company, supra* at 310, 80 P.2d at 704.

The only other Arizona Supreme Court decision involving a surety's liability to a third party materialman on a performance bond is *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956). In this case, as in *Webb,* a subcontractor's materialman filed suit against the general contractor and his surety, seeking to recover as a third party beneficiary of the performance bond executed by the contractor and surety company. The obligee of the bond was, of course, the owner of the premises and neither the materialman nor any other third person was mentioned in the bond as a beneficiary thereof.

The contractor and surety appealed from a trial court judgment for the materialman alleging that he could not recover on the bond because there was no privity of contract between plaintiff and the contractor. The materialman, however, asserted that he could recover under an Arizona statute, no longer in force, which provided that licensed contractors must procure a surety bond conditioned upon full performance and payment of all sub-

contractors and materialmen before they could begin work on a public project.

The Court said that in order to prevail the third person must show that the bond can be construed to give him a beneficial interest in it. However, the Court held that the statute had to be read into the bond, and, once read into it, the legislative intent to benefit subcontractors and materialmen, which gave rise to the statute, became a part of the bond. The bond, with the statute read into it, became conditioned on payment as well as performance, and nonpayment rendered the surety liable. *Porter v. Eyer, supra* at 173, 294 P.2d at 664.

Both the *Webb* and *Porter* cases raised the third party beneficiary question in a principal-surety context. The court also decided two third party cases which arose in situations outside the principal-surety area after *Treadway v. Western Cotton Oil* but before its definitive opinion in *Irwin v. Murphey,* 81 Ariz. 148, 302 P.2d 534 (1956), to be discussed later. The first of these two decisions, *Seargeant v. Commerce Loan and Inv. Co.,* 77 Ariz. 299, 270 P.2d 1086 (1954) was reaffirmed by the Court in *Irwin v. Murphey.* The second case, *McCain v. Stephens,* 80 Ariz. 306, 297 P.2d 352 (1956), was decided five months prior to *Irwin* and held in effect that in determining whether a person is a third party beneficiary of a contract to which he was not a party, parol evidence outside of the language of the contract can be considered. *McCain* was completely ignored by the Court in *Irwin* and in its only other third party case, *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 428 P.2d 115 (1967).

Irwin v. Murphey. 81 Ariz. 148, 302 P.2d 534 (1956), is the most comprehensive statement of the Arizona law relative to third party beneficiary contracts, at least in nonprincipal-surety cases. This was a mortgage foreclosure action in which the mortgagee under a building loan agreement sought to foreclose the interest of the mortgagor and determine the rights of appellant, a materialman who claimed a mechanic's lien on the mortgaged

property. The building loan agreement was a simple construction loan document that provided that upon certification that certain amounts of work had been completed, the mortgagee would pay certain amounts of money to the mortgagors. The Appellant, a materialman and unsuccessful lien claimant, answered and counterclaimed asserting that he was a third party creditor beneficiary of the building loan agreement.

In addressing itself to the third party creditor beneficiary argument, the Court reviewed the *Restatement of Contracts* position that "one for whose benefit a contract is made, although not a party to the agreement and not furnishing the consideration therefor, may maintain an action thereon against the promissor" even if he is only an incidental beneficiary. *Irwin v. Murphey, supra* at 152, 302 P.2d at 537. The Court, however, rejected the *Restatement* position, stating that in Arizona the rule has always been that in order to prevail as a third party beneficiary of a contract, the contract itself must indicate a direct intent to benefit the alleged third party. Citing its earlier decision in *Treadway,* the Court stated that "the benefit contemplated must be intentional and direct."

> Whether a third-party beneficiary is merely an incidental beneficiary, or one for whose express benefit the contract was entered into and therefore one who can maintain an action on the contract, is always a question of construction. . . . It would not be necessary in such an agreement to identify a beneficiary. It is sufficient if the agreement clearly showed an intent that Murphey was to pay directly any person who may furnish labor or material in the construction of such dwelling. *Irwin v. Murphey, supra* at 153, 302 P.2d at 537.

The Court then reviewed the trial court's findings that, although the mortgagee was obligated under the agreement to hold the total amount provided in the note available for his mortgagor, he did not hold any funds "in escrow or in trust for the benefit of any of the defendants." *Irwin v. Murphey, supra* at 154, 302 P.2d at 538. Since the mortgagee could have paid all the funds directly to the mortgagor and had no contractual duty to pay any-

one other than the mortgagor, the Court held that *Irwin* was not a third party beneficiary under the construction loan agreement. It then concluded its discussion of the third party issue by stating:

> To find that Appellant Irwin was the direct and intentional beneficiary of this agreement, without supporting facts, would be to alter or add to or change the written contract of the parties. Under the law as laid down by this Court and which we feel is stare decisis, it definitely must appear that the parties intend to recognize the third party as the primary party in interest and, as privy to the promise, in order for the third party to recover. *Irwin v. Murphey, supra* at 154, 302 P.2d at 538.

The Supreme Court of Arizona has recently reaffirmed its holding in *Irwin.* In a decision handed down last year, on facts similar to *Irwin,* the Court cited with approval its language in *Irwin* to the effect that in order to recover as a third party beneficiary of a contract, the would-be third party must show that the contract itself reveals an intent to directly benefit him. *Pioneer Plumbing Supply Company v. Southwest Savings & Loan Association,* 102 Ariz. 258, 261, 428 P.2d 115, 118 (1967).

The Supreme Court did not deal at length with the third party beneficiary issue in *Pioneer Plumbing.* Nor did that case involve a surety bond. However, the Arizona Court of Appeals has recently handed down a decision involving a materialman's right to sue as a third party beneficiary on a contractor's performance bond. This case, *Ed Stearman and Sons, Inc., v. State ex rel. Union Rock and Materials Co.,* 1 Ariz. App. 192, 400 P.2d 863 (1965), like the instant case, was an appeal from a summary judgment. In the *Stearman* case, a materialman had furnished material to a subcontractor for use on a state highway construction project. When the subcontractor did not pay the materialman, the materialman brought his action against the general contractor and the contractor's surety under a performance bond which was required by the state.

The general contractor and his surety appealed from a summary judgment granted in favor of the subcontractor's materialman. They argued that since there was no privity of contract between

the materialman and the contractor or the surety, the materialman could not recover on the bond because he was only an incidental beneficiary thereof. This, they contended, was true because the bond was conditioned only on the contractor fulfilling its obligations to the obligee under the bond, the State of Arizona, and they alleged that the contractor had fulfilled all these obligations by paying his subcontractor. It was the subcontractor who had not paid plaintiff.

The Arizona Court of Appeals, after noting that one of the conditions of the bond was that the contractor-principal would pay all laborers, mechanics, subcontractors and materialmen, cited the earlier case of *Webb v. Crane Company, supra,* as controlling. For, the court noted, the facts in the *Webb* case were quite similar and the relevant wording of the bond in *Webb* was the same as the condition of the bond in *Stearman.* The provisions in the bond that the contractor-principal would promptly pay all subcontractor's materialmen was therefore sufficient to make the materialman a beneficiary entitled to sue on and recover under the bond.

The Arizona Court of Appeals was urged, in *Stearman,* to reverse the trial court's decision because of the decision of the Ninth Circuit Court of Appeals in *American Radiator and Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9th Cir. 1958), which the contractor and surety argued was controlling. This case involved a suit by a subcontractor's materialman against the general contractor and his surety on a performance bond given pursuant to a State statute which required surety bonds on public construction projects.

The contract between the contractor and the school board provided that the contractor "shall provide and pay for all materials . . . necessary to complete the work." *American Radiator and Standard Sanitary Corporation v. Forbes, supra* at 148. The contractor had, in fact, paid the subcontractor with whom the materialman had contracted, but the subcontractor had not paid the materialman. Consequently, the materialman argued that the con-

tractor had breached the contractual requirement that he "provide and pay for" all materials. In addition, the materialman contended that the state statute pursuant to which the bond was executed had to be read into the bond and that this statue indicated a legislative intent to benefit the materialmen of subcontractors.

The Circuit Court dismissed both arguments summarily. Insofar as the first argument was concerned, the Court noted that the general contractor had in fact paid the subcontractor with whom the materialman had contracted. This, the Court held, fulfilled the contractor's obligation to pay for all materials used, especially since there was nothing in the contract to indicate that the parties to the contract had intended to benefit subcontractors' materialmen. This conclusion was buttressed by the fact that there was no extrinsic evidence which would prove such an intention. There was, therefore, no breach of the contract between the contractor and the Board of Supervisors.

With respect to the second contention, the Circuit Court of Appeals was unable to find any evidence that the legislature intended the statutory performance bond to benefit subcontractor's materialmen. Consequently, the Court concluded that the subcontractor's materialmen could not rely on the statute to make him a third party beneficiary of the bond. The Court stated:

> The bond on its face contains two defenses to this action: (1) that the Bonding Company shall indemnify the named obligee (the school district or the Board of Supervisors), and (2) that third parties are expressly denied the right to sue thereon. *American Radiator and Standard Sanitary Corporation v. Forbes, supra* at 150.

Hence, even though "Arizona follows the rule that the provisions of a bond will be construed most strongly against a paid surety," the rule could not aid the materialman before the Court. The language in the bond was too clear to leave room for construction since it expressly stated that third parties could not sue on it. *American Radiator and Standard Sanitary Corporation v. Forbes, supra* at 150.

The Arizona Court of Appeals in the *Stearman* case found the *American Radiator* case to be clearly distinguishable from the case before it because of the fact that the bond in *American Radiator* expressly provided that third parties could not recover on it. *Ed Stearman and Sons, Inc. v. State ex rel. Union Rock and Materials Company, supra* at 195, 400 P.2d at 866. The Arizona court did not, therefore, feel that the *American Radiator* case was in any way controlling.

Both the *American Radiator* and the *Stearman* cases contained statements to the effect that under the Arizona law of principal and surety a contract of surety is to be construed most strongly against the surety. This rule of construction can be traced to the Arizona Supreme Court's decision in *Massachusetts Bonding and Insurance Company v. Lentz,* 40 Ariz. 46, 9 P.2d 408 (1932). There the Court stated that suretyship has become primarily a business, like insurance, and therefore the old common law rule of *strictissimi juris* is no longer applicable to the construction of a suretyship contract if the surety is paid. On the contrary, the Court stated that "the contract will be construed most strongly against the surety and in favor of the indemnitee as are other contracts of insurance." *Massachusetts Bonding and Insurance Company v. Lentz, supra* at 50-51, 9 P.2d at 409.

The foregoing cases adequately summarize the Arizona decisions dealing with third party beneficiaries and with construction of surety contracts. Certain principals set forth in these cases can and must be applied, insofar as relevant, to the facts before the Court presently. Those principals, and the cases from which they are drawn are:

1. A third person can recover on a contract to which he is not a party only if the contract reveals that the parties to the contract intended that the contract would directly benefit the third party or a class of which he is a member. *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 261, 428 P.2d 115, 118 (1967); *Irwin v. Murphey,* 81 Ariz. 148, 153, 302 P.2d 534, 537-38 (1956); *Seargeant v.*

Commerce Loan and Investment Company, 77 Ariz. 299, 303, 270 P.2d 1086, 1089 (1954); *Treadway v. Western Cotton Oil & Ginning Company,* 40 Ariz. 125, 139, 10 P.2d 371, 375-76 (1932).

2. Laborers and materialmen are entitled to recover on performance bonds executed in connection with public works or improvements where the bond contains a condition for their benefit and is intended for their protection even though the public body is the only obligee named in the bond and there is no express provision that such third parties shall have any rights thereunder. *Webb v. Crane Company,* 52 Ariz. 299, 307-10, 80 P.2d 698, 703-04 (1938); *Ed Stearman and Sons, Inc., v. State ex rel. Union Rock and Materials Company,* 1 Ariz. App. 192, 194, 400 P.2d 863, 865 (1965).

3. Surety contracts and bonds will be construed most strongly against a paid surety and in favor of the indemnities thereunder. *American Radiator and Standard Sanitary Corporation v. Forbes,* 259 F.2d 147, 150 (9th Cir. 1958); *Massachusetts Bonding and Insurance Company v. Lentz,* 40 Ariz. 46, 50-51, 9 P.2d 408, 409 (1932); *Ed Stearman and Sons, Inc. v. State ex rel. Union Rock and Materials Company, supra* at 195, 400 P.2d at 866.

Application of these principals to the facts before the Court, plus a further analysis of the particular cases discussed above, reveals that the contract which was incorporated into the bond in the instant case does express a sufficient intent to benefit Appellant directly so that he is entitled to recover on the bond as a third party beneficiary thereof.

The bond provides in part:

> WHEREAS, the above bounden Principal has entered into a certain written contract with the above named Obligee, dated the 26th day of NOVEMBER, 1963 . . . *which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.* (TR 17.) (Emphasis added.)

The contract, incorporated by the above reference into the

bond, contains several sections which on their face reveal a specific intent on the part of the bond's obligee, Mountain States, and the principal under the bond, Ewald, to benefit third parties, such as appellant, Ewald's materialman.

> Article Eleven of the construction contract states as follows:
> The Telephone Company shall have the right to require the Contractor to furnish, at the Telephone Company's expense . . . a bond covering the full and faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the Telephone Company may prescribe and with such surety as it may approve.
>
> Exhibit "A" of the specific job contract (TR 13) provides:
>
> This is the Exhibit "A" referred to in the foregoing contract dated the Twenty-sixth day of November, 1963, between THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY and Ellsworth H. Ewald, an individual doing business as Ewald Contracting Company.
>
> This Exhibit "A" consists of this sheet and the following described contract documents *which are attached hereto and made a part of the Contract:* . . . Award to Bid Letter: . . . (Emphasis added.)

The "Award to Bid Letter" which was incorporated into the construction contract which, in turn, was incorporated into the bond, was attached as a part of exhibit 1 to the deposition of Samuel Beard. (Deposition pages 8-12.) The first sentence of the last paragraph of this letter states that "A Performance and Payment Bond *will* be required."

Viewed as integrated parts of the contract, Article 11 gave the Telephone Company the right to require Ewald to give a performance and payment bond. The Award to Bid Letter of November 26, 1963, which by virtue of Exhibit "A" to the contract became a part thereof, demonstrates unequivocally that this right was exercised and a performance and payment bond *was* required. These facts, which appear in the contract itself, bring the case within the scope of *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956), and *Irwin v. Murphey,* 81 Ariz. 148, 302 P.2d 534 (1956).

In the *Porter* case, a statute in effect at the time the performance bond sued upon was executed, required that contractors on public projects post performance and payment bonds. This statute, the Court concluded, had to be read into the bond and the bond, although admittedly only a performance bond, because conditioned on both the contractor's performance and his payment of subcontractors and materialmen. The "obvious intent" of the legislature of assuring both completion of the project *and* payment of subcontractors and materialmen also became the intent of the parties to the bond because the bond was admittedly executed pursuant to the statute. *Porter v. Eyer,* 80 Ariz. 169, 173, 294 P.2d 661, 664 (1956). The bond became, as a matter of law, conditioned on the contractor's payment of materialmen who thereby became intended beneficiaries of the bond. Hence, nonpayment of the materialmen was a breach of the bond and the surety became liable to the materialmen for the balance owed them by the contractor. *Porter v. Eyer,* 80 Ariz. 169, 172-74, 294 P.2d 661, 662-64 (1956).

The only difference between *Porter* and the instant case is that the performance and payment bond was required by statute in *Porter* whereas it was required by the contract between Mountain States and Ewald in the case presently before the Court. The contract, however, *must* be read into the present bond just as the statute was read into the bond in *Porter* because it is specifically incorporated into the bond. (TR 17.) In determining the Appellant's right to recover on the bond, all of the provisions of the contract must be construed as a part of the bond and the intent of the parties must be ascertained from reading all of the parts of the contract into the bond. *Westinghouse Electric Corporation v. Mill & Elevator Company,* 254 Iowa 874, 118 N.W.2d 528, 530 (1962); *Gibbs v. Trinity Universal Insurance Company,* 330 P.2d 1035, 1040 (Okla. 1958). Appellee has never disputed this and, in fact, conceded this throughout the proceedings before the trial court. (E.g., TR 27, 34.) With the contract read into the bond, the present bond, like the bond in *Porter*

becomes conditioned on payment as well as performance, even though the bond, read alone, is merely a performance bond. And, the "obvious intent" of the Telephone Company in requiring a payment bond, like the "obvious intent" of the legislature in *Porter,* is to protect the materialmen who furnish supplies to the contractor-principal. It follows here, as it did in *Porter,* that the "persons entitled to payment certainly are third party beneficiaries under the bond." *Porter v. Eyer,* 80 Ariz. 169, 173, 294 P.2d 661, 664 (1956.)

Even without using *Porter,* there are sufficient expressions of an intent to benefit Appellant in the contract to satisfy the *Irwin v. Murphey* requirement discussed earlier.

As mentioned above, article 11 (TR 11) and the Award to Bid Letter (Deposition Exhibit 1) in the contract required the contractor to furnish a performance and payment bond. The performance bond was undoubtedly required to protect Mountain States in the event that Ewald did not complete the construction job. The payment bond, just as clearly, was not intended to protect Mountain States. It needed no protection from Ewald's nonpayment because with respect to the construction project involved here, Mountain States did not contract with any person other than Ewald. Therefore, not having contracted with any of Ewald's materialmen or subcontractors, Mountain States had no need of a payment bond to protect itself from liability to them. They would have no basis for recovering from Mountain States.

By the same token, the payment bond certainly was not required to protect Mountain States from liens which Ewald's subcontractors and materialmen might file against the property upon which the work was performed. The work here was performed upon public property (TR 36, 46) and public property in Arizona is not subject to mechanic's or materialmen's liens. *Webb v. Crane Company,* 52 Ariz. 229, 307-08, 80 P.2d 698, 703 (1938).

Since Mountain States was not contractually liable to the materialmen and subcontractors with whom Ewald might contract, and since the property upon which the work was performed could

not be liened, the requirement in the contract that Ewald furnish a payment bond was clearly not intended for Mountain States' benefit. It could only have been intended to benefit the subcontractors and materialmen with whom Ewald might contract.

There is in the record in this case additional extrinsic evidence that the contractual requirement of a payment bond was actually intended to benefit Appellant. Samuel Beard, a representative of Mountain States Telephone and Telegraph Company, testified during the taking of his deposition, on cross-examination, that "payment bonds were required to protect suppliers in the event of a contractor's nonpayment of bills or labor, and to provide coverage for such persons." (Deposition 19.) This testimony is additional evidence that the contractual requirement that a payment bond be furnished by the contractor was intended to benefit Appellant. It is the type of "extrinsic testimony" which the Ninth Circuit Court of Appeals indicated it would consider when attempting to ascertain if a bond were intended to benefit a third person such as a materialman. *American Radiator and Standard Sanitary Corporation v. Forbes,* 259 F.2d 147, 149 (9th Cir. 1958).

The Arizona Supreme Court, by quoting an annotation with approval in *Webb v. Crane Company,* 52 Ariz. 299, 310, 80 P.2d 698, 704 (1938), held that materialmen have a right

> to recover on a bond executed in connection with public works or improvements, where the bond contains a condition for their benefit and is intended for their protection, although the public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder . . . .

This conclusion was apparently based on the Court's holding that public property could not be liened in Arizona and that there was, therefore, need for another remedy to protect materialmen who furnished supplies used on public projects. The remedy contemplated by the Court was obviously a right of action against the surety on the performance bond if "the bond contains a condition for their benefit and is intended for their protection." *Webb*

v. Crane Company, supra. The bond in the instant case, by incorporating the contract which requires the contractor to provide a payment bond, contains "a condition" for the benefit of Appellant, and, as discussed above, was intended to protect him. Thus, since the material furnished here was used on public property, the same policy considerations which prompted the Supreme Court's decision in *Webb* are present here and constitute additional reasons for this court to conclude that Appellant was a third party beneficiary of the bond and contract and entitled to recover on the bond. This is particularly so since, under Arizona law, all ambiguities in the contract and bond are to be construed against the surety. *American Radiator and Standard Sanitary Corporation v. Forbes,* 259 F.2d 147, 150 (9th Cir. 1958); *Massachusetts Bonding and Insurance Company v. Lentz,* 40 Ariz. 46, 50-51, 9 P.2d 408, 409 (1932); *Ed Stearman and Sons, Inc. v. State ex rel. Union Rock and Materials Company,* 1 Ariz. App. 192, 195, 400 P.2d 863, 866 (1965).

There is another persuasive reason why Appellee should be liable to Appellant on the performance bond which was posted.

Under the contract which was incorporated into the bond, the contractor was required to furnish a payment bond (Award to Bid Letter, Deposition Exhibit 1) and to furnish all materials which the contract required of him. (Article 2, TR 9.) Although the bond which he secured in attempted compliance with the contract was only a performance bond, it guaranteed that he would perform *all* of the duties required of him by the contract. (TR 17.) He did not, however, perform two of these contractual obligations. He did not give a payment bond; only a performance bond was given, (TR 17) and he did not pay for the materials which he used (TR 59-60) so he did not "furnish" these materials as required by Article 2 of the contract (TR 9). Therefore, the surety was liable under the performance bond because the principal did not perform all of the obligations, performance of which was guaranteed and which were, as discussed above, intended for the benefit of materialmen.

None of the three Arizona surety decisions discussed above approached the problems concerning the surety's liability in this manner, probably because they were able in each instance to reach the bond without having to use this approach. However, several courts in other states have utilized this theory to allow unpaid materialmen to reach the bond.

The Supreme Court of Kansas, in *Topeka Steamboiler Works, Company v. United States Fidelity and Guaranty Company,* 136 Kan. 317, 15 P.2d 416 (1932), held that a clause in a contract requiring the contractor to "furnish all labor and material" imposed a duty on the contractor to pay for the goods, especially since the contract price which the contractor received was arrived at by making an allowance sufficient to cover their purchase. The court held that:

> When, from the contract as a whole, it is clear that the contractor was to pay for material and labor necessary for the construction of the building, and a bond is given to secure the faithful performance of the contract, materialmen and laborers who have not been paid may sue directly upon the bond. *Topeka Steamboiler Works, Company v. United States Fidelity and Guaranty Company,* 15 P.2d at 419. (Citations omitted.)

The highest tribunal in Missouri recently reached the same conclusion with respect to a contractor's duty to pay for goods which the contract required that he "furnish" in *LaSalle Ironworks, Inc. v. Largen,* 410 S.W.2d 87, 92 (Mo. 1966).

Hollerman Manufacturing Company v. Standard Accident Insurance Company, 61 N.D. 637, 239 N.W. 741 (1931), was a suit by a materialman against the instant Appellee's predecessor on a performance bond identical in all respects to the bond against which this suit was brought. The contract incorporated into the bond in *Hollerman,* like the contract in the principal case, required that the contractor provide a payment and performance bond, conditioned, in addition to faithful performance, on the contractor paying all materialmen who contracted directly with him. The contractor did not, however, furnish a payment

bond. Instead, only a bond identical to the bond involved in the instant case was furnished.

The surety company in *Hollerman* raised the same arguments in defense of the materialmen's suit that the same surety in the instant case raised in its supplemental memorandum of points and authorities in support of its motion for summary judgment. (TR 95-101.) This argument was to the effect that even though the contract which was incorporated into the bond may require a payment bond, if a payment bond was not executed, the contractual requirement must be deemed waived.

The Court, however, rejected this argument. It reasoned that since the contract which required execution of a payment bond was incorporated into the bond, the requirement could not have been waived because it became a part of the bond.

> Under the rules of interpretation, the bond, contract, and specifications must be construed together to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful, and so as to give effect to every part if reasonably practicable, each clause helping to interpret the others, and, when so considered, it is clear that, when the parties united the specifications in the contract into the bond, making the obligation of the contract the obligation of the bond, they intended the bond as security for the payment of labor and material in case the principal made default in payment thereof. *Hollerman Manufacturing Company v. Standard Accident Insurance Company,* 239 N.W. at 744-45.

There are, of course, numerous other decisions in which unpaid materialmen, as third party beneficiaries, were allowed to recover on contractors' performance bonds under facts quite similar to the facts of the instant case. See, *e.g., Royal Indemnity Company v. Alexander Industries, Inc.,* 211 A.2d 919 (Del. 1965); *National Surety Company v. Rochester Bridge Company,* 83 Ind. App. 195, 146 N.E. 415 (1925); *Gibbs v. Trinity Universal Insurance Company,* 330 P.2d 1035 (Okla. 1958); *Engert v. Peerless Insurance Company,* 53 Tenn. App. 310, 382 S.W.2d 541 (1964).

Applying the theory of these cases to the instant case, the contractual provisions requiring Ewald to provide a payment bond and to furnish his materials are sufficient expressions of an intent to benefit third persons to entitle Appellant to sue on the performance bond into which the contract was incorporated as a third party beneficiary thereof. Ewald's failure to provide a payment bond and his failure to furnish materials are breaches of the contract, full performance of which was guaranteed by the performance bond, and Appellant is, therefore, entitled to recover from Appellee on the bond.

CONCLUSION

The rights of the parties to this appeal must be determined in accordance with Arizona law.

The contract which was incorporated into the performance bond was, as a matter of Arizona law, intended to benefit Appellant directly and Appellant was therefore entitled to sue on the bond as a third party beneficiary. As a third party beneficiary of the bond, Appellant was entitled to recover on the bond under either one of two theories.

Under the first theory, when the contract was incorporated into the bond the contractual requirement that the contractor execute a payment bond became a part of the bond and the bond became conditioned on the contractor's payment of Appellant, a materialman. Nonpayment of Appellant was a breach of the payment condition of the bond and Appellant was entitled to recover its unpaid balance from Appellee, the surety on the bond.

Under the second theory, the performance bond guaranteed that the contractor would fully perform the contract. He did not, however, post a payment bond nor did he properly furnish materials as contemplated by the contract. Therefore, he did not fully perform the contract and the surety on the performance bond is liable to Appellant for the contractor's nonperformance, Appellant, being, as a matter of Arizona law, an intended third party beneficiary of the contract.

Under either theory, Appellant was entitled to recover on the bond as a third party beneficiary. This conclusion was required as a matter of law and Appellant respectfully requests that the Court enter an order reversing the district court's judgment of July 24, 1967 and directing the district court to enter judgment for Appellant on its Second Motion for Summary Judgment.

Respectfully submitted,
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By_____
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_____
James K. LeValley

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief complies with those Rules.

_____
Earl E. Weeks

Three copies of the foregoing brief were delivered this 16th day of February, 1968, to:

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_____
James K. LeValley

No. 22,290

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHNS-MANVILLE SALES CORPORATION,
a Delaware corporation,

Appellant,

v.

ELLSWORTH H. EWALD, aka E. H. EWALD,
dba EWALD CONTRACTING COMPANY, and
RELIANCE INSURANCE COMPANY, a
Pennsylvania corporation, as successor
in interest to Standard Accident
Insurance Company, a Michigan
corporation,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE RELIANCE INSURANCE COMPANY

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& TRASK
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corporation,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE RELIANCE INSURANCE COMPANY

JURISDICTION

This action was commenced by Appellant in the Superior Court of the State of Arizona in and for the County of Maricopa (TR 5-18). It was removed by Appellee to the United States District Court for the District of Arizona pursuant to and in accordance with Title 28, *United States Code,* § 1446, as amended (TR 1-4,

23, 123-126). The action was one within the original jurisdiction of the District Court of the United States pursuant to Title 28, *United States Code,* § 1332 (1964), in that the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs (TR 8) and is between citizens of different states — Appellant being a corporation of the State of Delaware and not a citizen of the State of Pennsylvania, and Appellee being a corporation of the State of Pennsylvania, with its principal place of business in the City of Philadelphia, Pennsylvania (TR 2). None of the parties in interest properly joined and served as defendants being a citzen of the State of Arizona (TR 1-2), the action was removable pursuant to the provisions of Title 28, *United States Code,* § 1441.

Appellee's Motion for Summary Judgment against Appellant was granted, and Appellant's Motion for Summary Judgment against Appellee was denied by the Honorable William P. Copple, Judge of the United States District Court for the District of Arizona, on July 24, 1967 (TR 104-104A).

On August 2, 1967, Appellant filed a "Motion to Vacate Judgment and for Order Granting Plaintiff's Cross-Motion for Summary Judgment, or in the alternative, Motion for New Trial, or in the alternative, Motion to Amend Judgment" (TR 108-113). Appellant failed to appear for oral argument and the motions were denied by minute entry on August 14, 1967 (TR 131).

Appellant's Notice of Appeal was filed on September 12, 1967 (TR 116). Appellant's Appeal Bond was thereafter filed on September 21, 1967 (TR 119-120). Appellant asserts the jurisdiction of this Court pursuant to the provisions of Title 28, *United States Code,§ 1291 (Opening Brief, at 2).*

STATEMENT OF THE CASE

Nature of Action. This action was brought by Johns-Manville Sales Corporation (hereinafter termed "Johns-Manville") against Standard Accident Insurance Company (hereinafter

termed "the Bonding Company") on a bond executed and delivered to Mountain States Telephone and Telegraph Company (hereinafter termed "the Telephone Company") by Ellsworth H. Ewald, doing business as Ewald Contracting Company (hereinafter termed "Ewald," or "the Contractor"), as principal, and the Bonding Company, as surety, for recovery of the value of materials furnished by Johns-Manville to Ewald for use on the bonded job (TR 6-18).

The Job. On November 11, 1963, the Telephone Company extended a written invitation for bids on a manhole and conduit job in the City of Tempe, Arizona.[1] By letter dated November 25, 1963,[2] Ewald submitted his bid, and by letter dated November 26, 1963 (hereinafter termed "the Award of Bid Letter"),[3] the Telephone Company advised Ewald that his bid was the lowest bid received. The letter stated: "A Performance and Payment Bond *will* be required."

The Job Contract. A Specific Job Contract (TR 9-16) dated November 26, 1963, was executed by Ewald, as contractor, and the Telephone Company. The work to be performed was set forth in Exhibit "A" attached to the contract and made a part thereof (TR 9). That exhibit purports to include, *inter alia,* the "Invitation to Bid Letter: Award to Bid Letter: and Contractor's Bid Attached" (TR 13), although none of such items appear as a part of the contract and bond which Johns-Manville attached to the Complaint as the basis of its claim (TR 6-18).[4] The Contract obligates the contractor to complete the work specified in Exhibit "A" in accordance with the Telephone Company's speci-

[1] A copy of this letter appears as a part of Exhibit 1 attached to the Deposition of Samuel Beard taken at Phoenix, Arizona, on April 25, 1967.

[2] *Ibid.*

[3] *Ibid.*

[4] The Complaint has never been amended so as to make the Award of Bid Letter a basis of the allegations contained therein.

fications (Article 1, TR 9) and, with specified exceptions, to "furnish" all necessary materials (Article 2, TR 9). Article 8 renders the contractor responsible for, and obligates him to indemnify and save the Telephone Company harmless from, losses, expenses or claims arising out of the performance of the work (TR 10-11). Article 11 gives the Telephone Company the "right" to require the contractor to furnish a bond covering the full and faithful performance of the contract and the payment of all obligations arising thereunder (TR 11), and Article 13 grants the Telephone Company the "option," as a condition precedent to final payment, to require the contractor to furnish satisfactory evidence that all claims for labor, material and other obligations arising under the contract have been satisfied (TR 12). The contract bears the notation "Approved by Legal Department 1/15/64" (TR 12).

The Bond. Ewald, as principal, and the Bonding Company, as surety, executed and delivered to the Telephone Company, as obligee, their bond dated November 26, 1963 (TR 17). By its terms Ewald and the Bonding Company "are held and firmly bound *unto Mountain States Telephone and Telegraph Company,*" subject to the condition:

> "That if the above bounden Principal shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified, and shall pay over, make good and reimburse *to the above named Obligee,* all loss and damage *which said Obligee may sustain* by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise, to be and remain in full force and effect." (TR 17; Emphasis supplied).

The bond refers to the Specific Job Contract and makes it a part thereof (TR 17). The bond bears the notation "Approved as to Form 1/15/64 Akolt, Shepherd & Dick, General Counsel" (TR 17).[5]

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[5] The cited law firm appears to be the Telephone Company's Denver, Colorado, attorneys. See Deposition of Samuel Beard, *supra* note 1, at 21.

Execution of Contract and Bond. Samuel Beard, an agent of the Telephone Company,[6] stated in a deposition that the Specific Job Contract was mailed to Ewald for his signature and was thereafter returned to him with Ewald's signature thereon.[7] The Award of Bid Letter was thereafter attached to the contract.[8] Mr. Beard stated that he had no direct dealings with Bonding Company regarding the preparation, execution and issuance of the bond, which was either mailed or delivered to him by Ewald.[9] Both the bond and the contract were reviewed and approved by the Telephone Company's attorneys in Denver.[10]

Johns-Manville secured an affidavit from Ewald, who was never served with process (Opening Brief, at 4), wherein he stated that he requested the Bonding Company to furnish him with a Performance and Payment Bond and that it was his intent that the Payment Bond provide a source of payment to materialmen in the event of default by him (TR 87). However, Ewald's written "Application for Contractor's Bond" reflects only a request for a "Performance," as opposed to a "Labor and Material," bond (TR 71). The Bonding Company's efforts to take Ewald's deposition (TR 102-103A) were thwarted when Ewald, after learning that he was being sought for service of a subpoena (TR 107), quit his job and left without a forwarding address (TR 105-106).

The Bonding Company's agent who issued the subject bond stated by affidavit that neither Ewald nor the Telephone Company requested of him or, to his knowledge, of anyone else acting for the Bonding Company, that the Bonding Company issue a Payment Bond, or any bond other than that which was in fact

[6] Deposition of Samuel Beard, *supra* note 1, at 5-7.

[7] *Id.* at 25-26.

[8] *Id.* at 28.

[9] *Id.* at 27.

[10] *Id.* at 26.

executed (TR 75-76), and a similar affidavit was submitted by the manager of the Bonding Company's surety claim department (TR 69-70).

The Claim of Johns-Manville. Johns-Manville claims to have delivered to Ewald, at the bonded job, materials having a value of $15,252.00, and that the materials were used by Ewald in the completion of work pursuant to contract between Ewald and the Telephone Company (TR 59-65).

The Judgment. The District Court Judge found that there existed no genuine issue as to any material fact and that the Bonding Company was entitled to a judgment against Johns-Manville as a matter of law (TR 104). The Bonding Company's Motion for Summary Judgment was therefore granted, and Johns-Manville's Motion for Summary Judgment was denied (TR 104-104A).

QUESTIONS PRESENTED

1. Whether an appeal can be taken from the District Court Judge's denial of Appellant's Motion for Summary Judgment and, if so, whether there are questions of material fact which preclude a direction that he grant such judgment.

2. Whether a materialman can, under Arizona law, maintain an independent action on a non-statutory surety bond in which he is not the named obligee, when that bond does not by its terms purport to afford materialmen a right of action thereon or to have been executed for their benefit, and does not contain a condition for their payment.

3. Whether a statement contained in the Telephone Company's Award of Bid Letter that a Performance and Payment Bond "will" be required has, by virtue of that letter's attachment to the construction contract as a part thereof, the effect of converting the bond for performance of the construction contract into a Payment Bond and, if so, whether Johns-Manville was

thereby afforded a right of action on the bond despite the fact that the letter did not by its terms prescribe that materialmen should have a right of action thereon or be benefited thereby.

4. Whether Ewald's failure to furnish the Payment Bond requested in the Award of Bid Letter constituted a breach of his construction contract and the bond for performance of that contract and, if so, whether materialmen who were not parties to either the construction contract or the bond are entitled to a right of action for the breach.

ARGUMENT

Summary of Argument

Johns-Manville asserts a right of action on the subject bond, *first,* on the theory that, pursuant to the authority of *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956) and *Webb v. Crane Co.,* 52 Ariz. 299, 80 P.2d 698 (1938), the subject bond manifests an intention to benefit and confer a right of action on materialmen and, *second,* on the theory that Ewald's failure to furnish a Payment Bond constituted a breach of his contract with the Telephone Company and his bond for performance of that contract, for which materialmen can, somehow, sue. An analysis of the relevant cases will dispel both assertions.

Under Arizona law, which governs, a third person can sue on a contract to which he was not a party only if the contract itself evidences an intent by the contracting parties, and particularly the promisor, that the third person or some class of which he is a member should have a right of action thereon. The right of action may be expressly conferred or it may be implied from language in the contract which clearly indicates the promisor's intention to be bound to the third person. In the case of statutory surety bonds, a condition for direct payment of materialmen has, in the absence of a provision to the contrary, been held to constitute a sufficient manifestation of the promisor's intention to be bound to materialmen to afford them

an independent right of action on the bond. A condition for performance by the contractor of a promise to "furnish" materials has, on the other hand, been held insufficient to afford materialmen a right of action on the bond. *Porter v. Eyer, supra.* In the case of bonds required by and executed pursuant to statutes which prescribe their terms, the bonds, are, as a matter of public policy, deemed to contain the terms prescribed by the statute and those terms are presumed to have the meaning and effect intended by the legislature.

The bond on which Johns-Manville has sued does not expressly afford materialmen a right of action thereon and it does not purport to be for their benefit. Nor is it conditioned upon their payment. The subject bond was not required by statute and it was not executed pursuant to any statute which prescribed its terms. The bond is, rather, what is commonly termed a Performance Bond, which runs from Ewald and the Bonding Company to the Telephone Company. It simply assures the Telephone Company that the job will be performed in accordance with the construction contract and indemnifies the Telephone Company against any loss which the Telephone Company might suffer by reason of a failure of performance. The construction contract is itself devoid of any promise to pay materialmen; it merely provides that Ewald will "furnish" necessary materials and indemnify the Telephone Company against claims. As such, Johns-Manville cannot, under the rule of *Porter v. Eyer, supra,* maintain an action thereon.

Although the Telephone Company's Award of Bid Letter stated that a Performance and Payment Bond "will" be required, that letter did not prescribe the terms of such a bond, and a Payment Bond was never executed by Ewald and his Bonding Company or insisted upon by the Telephone Company. Johns-Manville could, therefore, have no right of action on the Payment Bond, for it has never existed.

If, by his failure to execute a Payment Bond, Ewald breached

his contract with the Telephone Company and the condition of the bond for its performance, the right of action for that breach is that of the Telephone Company for indemnification of any loss which it may have suffered thereby, and not that of Johns-Manville on the bond which, as executed, nowhere contains a condition for payment of materialmen.

I.

THE DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS NOT AN APPEALABLE ORDER AND THE APPEAL THEREOF SHOULD BE DISMISSED.

The denial of a Motion for Summary Judgment is ordinarily a non-appealable order, because it does not impart finality. *E.g., Morgenstern Chemical Co. v. Schering Corporation,* 181 F.2d 160 (3 Cir. 1950). Finality was imparted to the judgment from which Appellant appeals, not because Appellant's Motion for Summary Judgment was denied, but because Appellee's Motion for Summary Judgment was granted. If this Court should determine that the District Court Judge erred in granting that motion, the conclusive effect of his judgment would thereby be destroyed and the matter should be remanded for reconsideration of Appellant's motion and, if it should again be denied, for trial; but this Court should not itself dispose of that motion.

> "The procedure for summary judgment under Rule 56 is similar and comparable to the procedure for judgment on the pleadings under Rule 12. Indeed, a motion under Rule 12, can, in proper case, be disposed of as a motion for summary judgment under Rule 56. But Rule 12 specifically reserves to the court the right to postpone decision on a motion for judgment on the pleadings until trial. It seems most unlikely that a similar postponement necessarily resulting from the exercise of discretion whenever summary judgment is denied under Rule 56 would create an immediately reviewable issue. So incongruous a consequence should be avoided, unless inescapable." 181 F.2d at 163.

Even if Appellant were to convince this Court that Appellee was not entitled to judgment as a matter of law, it does not inescapably follow that Appellant was itself entitled to judgment as a matter of law.

Under these circumstances Appellant's first and second specifications of error should be dismissed.

II.

UNDER ARIZONA LAW, WHICH GOVERNS, A STRANGER TO A CONTRACT CAN RECOVER ON THE CONTRACT ONLY IF THE THE CONTRACT ITSELF REVEALS AN INTENTION BY THE CONTRACTING PARTIES THAT IT DIRECTLY BENEFIT THE THIRD PERSON OR A CLASS OF WHICH HE IS A MEMBER.

Notwithstanding its assertion to the trial judge, that "defendant's non-surety cases are totally irrelevant to the surety bond before this court. . ." (TR 38), Johns-Manville now cites those cases as its source of the following principle:

> "1. A third person can recover on a contract to which he is not a party only if the contract reveals that the parties to the contract intended that the contract would direcly benefit the third party or a class of which he is a member. *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 261, 428 P.2d 115, 118 (1967); *Irwin v. Murphey,* 81 Ariz. 148, 153, 302 P.2d 534, 537-38 (1956); *Seargeant v. Commerce Loan and Investment Company,* 77 Ariz. 299, 303, 270 P.2d 1086, 1089 (1954); *Treadway v. Western Cotton Oil & Ginning Company,* 40 Ariz. 125, 139, 10 P.2d 271, 375-76 (1932)."

Appellee accepts that principle as a valid statement of Arizona law, which must govern the rights of the parties in this case.

A. THE INTENTION OF THE CONTRACTING PARTIES TO AFFORD THIRD PERSONS A DIRECT RIGHT OF ACTION ON A CONTRACT MUST BE INDICATED IN THE CONTRACT ITSELF.

The Arizona cases state that a third person has enforceable

rights under a contract only if it appears that the contracting parties intended to recognize him (1) as a primary party in interest and (2) as privy to the promise. *Seargeant v. Commerce Loan and Investment Company,* 77 Ariz. 299, 304, 270 P.2d 1086, 1090 (1954); *Irwin v. Murphey,* 81 Ariz. 148, 154, 302 P.2d 534, 538 (1956); *California Cotton Oil Corporation v. Rabb,* 88 Ariz. 375, 379, 357 P.2d 126, 129 (1960). In other words, it must appear that the contracting parties intended to confer a benefit directly upon the third person, and not simply that he would be incidentally benefited by the contract. *Coca-Cola Bottling Company of Tucson v. C.I.R.,* 334 F.2d 875 (9 Cir. 1964); *American Radiator & Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9 Cir. 1958). The Arizona Supreme Court "has adopted the rule that the intent must be indicated in the contract itself." *Irwin v. Murphey, supra* at 153, 302 P.2d at 537; *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 428 P.2d 115, 118 (1967).

B. THE PROMISOR'S INTENTION TO BE BOUND TO A THIRD PERSON MUST BE CLEARLY MANIFESTED.

The intent of the promisor, in particular, to be bound to a third person must be "clearly manifested." Thus, the Arizona Supreme Court recently quoted language from a California case, including the following, as supporting the promisor's position that third parties had no right of action on the contract being construed, to-wit:

> "[I]t is now well settled in this state that to give a third party, who may derive a benefit from the performance of a promise, an action thereon, there must have been an intent *clearly manifested by the promisor* to secure some benefit to the third party. . . ." *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association, supra,* 428 P.2d at 119 (Emphasis supplied).

That this is the rule also in Arizona is strongly suggested by the following quotations:

"It is not enough that the loan company may be incidentally benefited by the contract between Seargeant and O'Brien. There must be manifested in the language of the contract *an intent on the part of Seargeant* [the promisor] to assume and discharge O'Brien's obligation to the loan company. . . ." *Seargeant v. Commerce Loan and Investment Company., supra* at 303, 270 P.2d at 1089 (Emphasis supplied).

"There are no express statements in the agreement indicating that any class of persons furnishing work, labor or materials on such dwelling or that Irwin or any person similarly situated, was to directly benefit from it or *that Murphey {the promisor} intended* to be bound to anyone other than Luke. . . ." *Irwin v. Murphey, supra* at 153, 302 P.2d at 537 (Emphasis supplied).

"There is no evidence whatever *that Frost {the promisor} ever promised* Rabb [the third party] that the budget — which is labeled an 'estimate' — would be adhered to. . . ." *California Cotton Oil Corporation v. Rabb, supra* at 375, 357 P.2d at 128 (Emphasis supplied).

In each of the quoted cases the requisite contractual expression of the promisor's intent to confer a right of action upon third persons was found lacking and the third persons were, in each instance, held to have no independent right of action on the subject contract.

III.

IN THE CASE OF SURETY BONDS, THE REQUISITE INTENTION TO BENEFIT THIRD-PARTY MATERIALMEN MUST, IN THE ABSENCE OF AN EXPRESS PROVISION THAT THE BOND IS FOR THEIR BENEFIT, BE MANIFESTED BY A CONDITION FOR THEIR DIRECT PAYMENT.

Materialmen may clearly maintain an independent action against the surety on a bond which expressly provides that they, or some class of which they are a part, may do so. *United States Fidelity and Guaranty Company v. Hirsch,* 94 Ariz. 331, 385 P.2d 211 (1963); *Royal Indemnity Company of New York v.*

Business Factors, Inc., 96 Ariz. 165, 393 P.2d 261 (1964). And, while it has been suggested that no such right of action can accrue without "express language" that the bond shall be for the benefit of third persons (*Struckmeyer, J., dissenting in Porter v. Eyer,* 80 Ariz. 169, 175, 294 P.2d 661, 665 (1956)), the Arizona courts have sustained the right of materialmen to sue on statutory surety bonds containing no such express provision, when those bonds did contain an *express condition* for their direct payment. *Porter v. Eyer, supra; Webb v. Crane Company,* 52 Ariz. 299, 80 P.2d 698 (1938); *Ed Stearman & Sons, Inc. v. State,* 1 Ariz. App. 192, 400 P.2d 863 (1965). The express condition for direct payment was considered a sufficient manifestation of the promisor's intention to be bound to materialmen. Such intention has, however, been held to be negated by other provisions of the bond. *American Radiator & Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9 Cir. 1958). Contracts lacking *both* an express statement of intention to benefit third persons *and* a promise to pay them directly have been held to afford materialmen no right of action thereon. *Irwin v. Murphey,* 81 Ariz. 148, 302 P.2d 534 (1956); *cf. Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 428 P.2d 115 (1967). A bond, such as that now under consideration, conditioned upon "performance" of a contract wherein the contractor merely promised to "furnish" materials has, in the absence of an express condition for payment of materialmen, been said to afford materialmen no right of action thereon. *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661; see also *American Radiator & Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9 Cir. 1958). The bond on which Appellant has sued is, like the bond—apart from the statute—in *Porter v. Eyer,* conditioned upon Ewald's "performance" of his contract to "furnish" materials.[11]

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[11]It is, therefore, highly relevant that the Court therein stated that "if the judgment entered is to be sustained" it must be because of the statute involved therein. 80 Ariz. at 171, 294 P.2d at 662.

A. THE REQUISITE CONDITION FOR DIRECT PAYMENT OF MATERIALMEN OR A CLASS OF WHICH THEY ARE A MEMBER MUST BE FAIRLY EXPRESSED BY THE TERMS OF THE BOND ITSELF OR IN THE TERMS OF SOME INSTRUMENT WHICH IS REITERATED THEREIN BY REFERENCE.

The requisite condition for direct payment of materialmen must be found in the terms of the bond itself, or in the terms of some instrument which is reiterated therein by reference.

In two of the cases on which Appellant places primary reliance, *Webb v. Crane Co.* and *Ed Stearman & Sons, Inc. v. State,* both *supra,* the bonds were *required by statute* and were, contrary to the bond here involved, *by their express terms conditioned upon payment of materialmen.* In the context of such express language in the statutory bond, the Arizona Supreme Court, in *Webb,* quoted the following annotation as a correct statement of the law, to-wit:

> "The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, *where the bond contains a condition for their benefit and is intended for their protection,* although the public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder, is affirmed by the great weight of authority." *Supra* at 310, 80 P.2d at 704 (Emphasis supplied).

In other words, considered in light of the Court's view of the legislative intent behind the statutory expression of public policy requiring such bonds, the express condition for payment of materialmen was held to be sufficient evidence of the promisor's intention to be bound to materialmen to afford them an independent right of action on the bond, even though the bond did not expressly state, in addition to the express condition for their payment, that materialmen should have the right to sue thereon. In *Stearman,* citing the express condition for payment of material-

men in the statutory bond therein involved, the Arizona Court of Appeals, Division One, said:

> "*In the bond in question there is an express requirement that the principal shall promptly pay, among other things, the subcontractors' materialmen,* with the only limitation being that the obligation shall not go beyond the penal sum of the bond. To hold that a supplier of materials to a subcontractor is only an incidental beneficiary, *in view of such express language in the bond,* would constitute the throwing out of a substantial portion of the express provisions of the bond. . . ." 1 Ariz. App. at 195, 400 P.2d at 866 (Emphasis supplied).

Since the bonds in both *Webb* and *Stearman* were, unlike the bond herein, required by statute, the Court was justified in considering, as it did, the overriding intent of the legislature in requiring the bonds, to enlarge and give meaning to their express provisions. The bond on which Johns-Manville has sued herein is not such a bond and legislative intent has no place in its construction.[12] Moreover, the intent of a single party to a non-statutory bond should not, as does the intent of the legislature in the case of statutory bonds, create a presumption that all the parties shared that intent.

B. BONDS REQUIRED BY AND EXECUTED PURSUANT TO STATUTES WHICH PRESCRIBE THEIR TERMS ARE, AS A MATTER OF PUBLIC POLICY, DEEMED TO CONTAIN THE TERMS PRESCRIBED BY THE STATUTE, WHICH TERMS ARE DEEMED TO HAVE THE MEANING INTENDED BY THE LEGISLATURE, AND THE PARTIES ARE PRESUMED TO HAVE INTENDED THE EXECUTION OF A BOND CONTAINING THE STATUTORY TERMS.

The rule that a bond furnished pursuant to statutory mandate

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[12]With regard, however, to the question of legislative intent and public policy, it is worthy of note that the statute which required and prescribed the terms of the bond involved in *Porter v. Eyer* has been repealed. 80 Ariz. at 173, 294 P.2d at 663-664.

will be construed by the terms of the statute which prescribes its terms was authoritatively announced by the Arizona Supreme Court in *Commercial Standard Ins. Co. v. West,* 74 Ariz. 359, 361, 249 P.2d 830, 831 (1952), wherein the court said:

> "The bond in question is a little different in form and language to the above-quoted statute. Since, however, the bond is furnished because of the statutory mandate we shall construe the bond by the terms of the statute. This rule is well recognized and gives expression to the legislative intent.
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> > 'While a surety stands on the letter of his contract, the law at the time of the contract is to be considered in interpreting it, and if it gives to the contract a certain legal effect, that law is as much a part of the contract as if incorporated in it, and the surety is bound according to such law. The liability on statutory undertakings is measured by the terms of the statute, rather than by the wording of the instrument, for the sureties engage with eyes open to such statute. * * *' 50 Am. Jur., Suretyship, Section 33.
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> The Supreme Court of Iowa, in the case of Charles City v. Rasmussen, 210 Iowa 841, 232 N.W. 137, 139, 72 A.L.R. 638, succinctly stated the rule as follows:
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> > 'The bond in this case is a statutory bond, and the liabilities of the parties to the bond must be measured by the statute and not by the wording of the bond. * * * We have said repeatedly that any additions to such bond will be treated as surplusage, and any omission of the provisions of the statute will be read into the bond. * * *'
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> This is in accord with our holdings. . . ." (Emphasis supplied).

The rule has since been repeatedly reaffirmed. *Porter v. Eyer, supra; Employer's Liability Assurance Corporation v. Lunt,* 82 Ariz. 320, 313 P.2d 393 (1957); *Royal Indemnity Company of New York v. Business Factors, Inc.,* 96 Ariz. 165, 393 P.2d 261 (1964); *see Webb v. Crane Company, supra; Ed Stearman & Sons v. State, supra.* Parties who execute a bond pursuant to such a statute are presumed to have intended the execution of a bond containing the prescribed statutory terms and those terms

are presumed to have the meaning intended for them by the legislature. See *Porter v. Eyer, supra; Webb v. Crane Company, supra; Ed Stearman & Sons v. State, supra.*

C. THE SUBJECT BOND WAS NOT REQUIRED BY STATUTE AND WAS NOT EXECUTED PURSUANT TO A STATUTE PRESCRIBING ITS TERMS. IT CONTAINS NO EXPRESS DECLARATION OF INTENTION THAT MATERIALMEN SHOULD HAVE A RIGHT OF ACTION THEREON OR BE BENEFITED THEREBY AND IT CONTAINS NO EXPRESS CONDITION FOR DIRECT PAYMENT OF MATERIALMEN. IT IS CONDITIONED MERELY UPON "PERFORMANCE" OF A CONTRACT WHEREBY THE CONTRACTOR IS TO "FURNISH" MATERIALS, AND, AS SUCH, AFFORDS MATERIALMEN NO INDEPENDENT RIGHT OF ACTION THEREON.

The subject bond does not, as did the bonds in *Royal Indemnity Company of New York v. Business Factors, Inc.,* 96 Ariz. 165, 393 P.2d 261 (1964), and *United States Fidelity and Guaranty Company v. Hirsch,* 94 Ariz. 331, 385 P.2d 211 (1963), contain any express declaration of intention that materialmen should have a right of action thereon or that they should be benefited thereby. Nor does the subject bond, as did the bonds in *Webb v. Crane Company* and *Ed Stearman & Sons, Inc. v. State,* contain an express condition for direct payment of materialmen. The subject bond was not, as was the bond in *Porter v. Eyer,* required by and executed pursuant to a statute which prescribed its terms and thereby conditioned it upon direct payment of materialmen. And, its terms not being prescribed by any statute, as were the terms of the statutory bonds involved in *Webb, Stearman* and *Porter,* resort may not be had to some overriding legislative intent to give them meaning. The subject bond is, rather, like the bond which—exclusive of the terms of the statute which were read into it—was executed in *Porter v. Eyer,* conditioned upon "performance" of a contract whereby the contractor agreed to "furnish" the necessary materials. As such, the following language from *Porter v. Eyer* is controlling:

> "Generally speaking, in order that a suit be maintainable on a contractor's bond by or for the use of materialmen the bond must be construed so as to include the materialmen within its coverage, i.e., to give him some beneficial interest therein. Hence in the instant case *if the judgment entered is to be sustained,* it must be because the following statute, which was then in force and effect, brought plaintiff within the coverage of the bond. . . ." *Supra* at 171, 294 P.2d at 662-663 (Emphasis supplied).

Where, as here, there is no such statute to supply the missing condition for payment of materialmen, a materialman's right of action cannot be sustained.

IV.

THE TELEPHONE COMPANY'S AWARD OF BID LETTER, WHICH STATED THAT A PERFORMANCE AND PAYMENT BOND "WILL" BE REQUIRED, DID NOT CONVERT THE PERFORMANCE BOND INTO A BOND FOR DIRECT PAYMENT OF MATERIALMEN.

Johns-Manville contends that the Telephone Company's Award of Bid Letter, which stated that a Performance and Payment Bond "will" be required, converted the Performance Bond into a bond conditioned upon payment of materialmen.[13] This contention is logically fallacious, for no bond was ever executed which was in fact conditioned upon payment of materialmen. The Award of Bid Letter contains nothing more than an executory request by the Telephone Company for a Payment Bond, the terms of which were not prescribed, which bond was never executed by Ewald and his Bonding Company and was never insisted upon by the Telephone Company, whose attorneys approved acceptance of the bond which was executed.

Under such circumstances, the following quotations from

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[13]This argument loses force at the outset when it is remembered that Johns-Manville did not attach a copy of this letter, which it now asserts to be of such critical importance, to the Complaint as a part of the Contract and Bond on which it sued.

relevant decisions of the Eighth and Fourth Circuit Courts of Appeal are appropriate, to-wit:

> "When all is said the case is simply this: That Opdahl by his contract agreed to give a bond obligating himself to pay the claims of materialmen, but he failed to give any such bond. *The surety company signed the bond which was executed, and no other.* The bond itself did not provide for the payment of materialmen, nor did the contract contain any such provision.
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> "The case is not difficult, unless we try to make it different from what it really is. . . ." *Babcock & Wilcox v. American Surety Co.,* 236 Fed. 340, 342-343 (8 Cir. 1916) (Emphasis supplied).
>
> "It is insisted, however, that the bond is obligated to laborers and materialmen because the contract provides that the contractors shall furnish a bond for their protection as required by the laws of the United States. But the trouble is that the contractors did not furnish such bond. . . ." *United States v. Starr,* 20 F.2d 803, 805 (4 Cir. 1927).

A similar result was reached in *United States v. American Fence Const. Co.,* 15 F.2d 450 (2 Cir. 1926).

The bond here under consideration is not like the bond in *Daughtry v. Maryland Casualty Co.,* 48 F.2d 786 (4 Cir. 1931), which was conditioned upon performance of a contract which expressly stated that the contractor "concurrent with this contract, *does execute a bond. . . guaranteeing the faithful performance of this contract and the payment of the laborers' wages, bills for materials, and all expenses incurred by the contractor.*" 48 F.2d at 787 (Italics supplied by the court). In sustaining the right of a materialmen to sue on that bond the court said:

> "In the case at bar, the contract provided that the bond to be given should guarantee, not only the faithful performance of the contract, but also the payment of the bills for labor and materials. *This was not left to future action, but the bond was executed concurrently with the execution of the contract and the latter so states,* the language being that the 'contractor * * * will, *and concurrent with this contract does* execute a

> bond * * * guaranteeing * * * the payment of the laborers' wages, bills for materials, and all expenses incurred by the contractor.' While it is true, as argued, that the contract was signed by the contractor and not by the surety, it is true also that the contract containing the provision quoted was attached to and made a part of the bond which the surety did sign. In other words, the surety says in the bond, 'I am guaranteeing the performance of the contract hereto attached.' The attached contract says, 'The contractor will give bond guaranteeing the payment of labor and materials *and gives it concurrently herewith.*' Both the surety and the contractor, therefore, gave the bond to the city with the statement in writing attached hereto that same was to be given, *and was given,* to guarantee payment for labor and materials." 48 F.2d at 788 (Emphasis supplied).

The court, nevertheless, expressly reaffirmed the holding of *United States v. Starr, supra,* saying:

> "By no fair and reasonable construction of the bond and contract in the Starr Case could it be said that the parties intended that the bond there in question should protect laborers and materialmen. . . ." 48 F.2d at 789.

The case of *Glens Falls Indemnity Co. v. American Awning & Tent Co.,* 55 R.I. 284, 180 Atl. 367 (1935), dealt with a claim similar to that herein made by Johns-Manville, as follows:

> "We think *a specific undertaking to pay* for labor and materials ought to positively appear within the bond itself, or inasmuch as the bond is only one of a series of instruments, in some one of such instruments *clearly incorporating by reference such provision as a part of the bond.* We must, therefore, look for such a provision in the contract or in other instruments incorporated in it." 180 Atl. at 369 (Emphasis supplied).

Finding no such provision in either the bond or the contract, the Court rejected a contention that the incorporation into the construction contract of specifications which obligated the contractor to furnish a bond "for the prompt payment in full of all just debts for labor, materials and equipment incurred in the construction" was equivalent to a "specific undertaking" for payment and therefore gave laborers and materialmen a direct right of action on the bond, saying:

"The board, however, owes no duty to third parties to take a bond containing these requirements, and is not itself bound to do so. The state is not here asserting that the board was bound to take such a bond only, or that even section 1.17 was for the benefit of subcontractors. The board was free, if it so chose, to waive these requirements and take a bond without them. We think it did so in this case. 180 Atl. at 373.

* * * *

"If we refer to the standard specifications for the language which respondents claim imports an obligation, *we find merely what amounts to a general notification by the board to all bidders that it will require a certain bond before the acceptance of any bid and the closing of a contract. But neither in the bond in the instant case, nor in the contract does it carry this intention into effect.* 180 Atl. at 373 (Emphasis supplied).

Referring to language in a case cited by the bond claimants, the Court said:

"If what is meant by this language is that a statement in the proposal or the specifications specifying that the required bond shall contain a promise to pay for labor and materials is equivalent to language setting out an express promise or undertaking in the bond or contract itself, then we cannot follow that reasoning. The weight of authority on that point is clearly the other way. *In order for the laborer or materialman to recover, there must not only be an intent to secure some benefit to him, but there must also be a legally enforceable promise for his benefit. . . .*" 180 Atl. 372 (Emphasis supplied).

The Court concluded:

[W]e do not feel justified in extending by judicial construction the scope and effect of a surety bond particularly one where, as in the instant case, we must go far afield to find the necessary operative language to read into the bond in order to broaden the obligation of the surety." 180 Atl. at 374.

Nowhere do the Arizona cases suggest that a contracting party, such as the Telephone Company, can by its unilateral declaration of intention to require a Payment Bond, the terms of which are not prescribed, convert a non-statutory bond for performance of a construction contract into a bond for payment

of materialmen. On the contrary, the cases are clear that the intention of the "parties" determines the rights of third persons, with particular emphasis upon the intention of the promisor. The bond was a three-party contract and, as such, the intention of one, or less than all, of the parties cannot impose obligations or liabilities upon the Bonding Company which are not fairly expressed in and carried into effect by the bond which it executed. The Award of Bid Letter does not state that a Payment Bond was executed concurrently therewith and the bond which was executed does not state that it was executed pursuant to and in accordance with the requirements of the Award of Bid Letter. Moreover, the terms of that bond were not specifically prescribed. Absent some such evidence in the bond itself that a bond for payment of materialmen was not only intended by the parties but that the intention was being carried into effect by the bond in question, materialmen can have no rights thereon. *Glen Falls Indemnity Co. v. American Awning & Tent Co.,* 55 R.I. 284, 180 Atl. 367 (1935), reargument denied, 55 R.I. 308, 181 Atl. 297 (1935); *United States v. Starr,* 20 F.2d 803 (4 Cir. 1927); *United States v. American Fence Const. Co.,* 15 F.2d 450 (2 Cir. 1926); *Babcock & Wilcox v. American Surety Co. of New York,* 236 Fed. 340 (8 Cir. 1960); *cf. Daughtry v. Maryland Casualty Co.,* 48 F.2d 786 (4 Cir. 1931).

V.

IF EWALD'S FAILURE TO FURNISH THE PAYMENT BOND REQUESTED IN THE AWARD OF BID LETTER CONSTITUTED A BREACH OF HIS CONSTRUCTION CONTRACT AND THE BOND FOR ITS PERFORMANCE, ANY RIGHT OF ACTION FOR THAT BREACH MUST BE THAT OF THE TELEPHONE COMPANY AND NOT OF SOME STRANGER TO THE CONTRACT AND BOND.

The construction contract does not purport to be for the benefit of materialmen and, as previously noted, obligated Ewald merely to "furnish" materials and to indemnify and hold the Telephone Company harmless against claims. The Telephone Com-

pany had certain options, which, if insisted upon, would incidentally have benefited materialmen, such as the right to require a Payment Bond and to withhold final payment pending receipt of satisfactory evidence that all materialmen had been paid. But no Payment Bond was ever executed. If Ewald breached his contract with the Telephone Company by his failure to execute a Payment Bond, the right of action for that breach is that of the Telephone Company on the contract and the bond for its performance which was executed, by way of indemnification for its loss, if any, and not that of materialmen in whom no rights were ever vested.

The rights of Johns-Manville against Ewald must rest not upon Ewald's bonded contract with the Telephone Company, but upon Ewald's contract with Johns-Manville. If Johns-Manville had deemed a payment bond essential for its protection, it could have exacted such a bond as a condition of its contract. It did not, however, do so and the record is devoid of evidence that it relied upon the bond which had been given to the Telephone Company. Under the circumstances the following comments of the Arizona Supreme Court in the recent case of *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association, supra,* are particularly appropriate:

> "Pioneer and Rural [material suppliers] contend that it is the policy of Arizona to protect the rights of those who furnish labor and materials to improve property. With this principle we agree; however, those rights must be established under existing law. . . ." 428 P.2d at 122.
>
> "[I]t may well be that labor and materialmen in order to secure business and work, have furnished labor and material without properly protecting themselves by contract or otherwise. . . ." 428 P.2d at 123.

Material suppliers who in their quest for profits take such risks without adequate security, should not in their search for payment be permitted, by the windfall of judicial construction, to rewrite a surety bond to which they were not a party, so as to afford themselves a right of action thereon.

CONCLUSION

The bond on which Johns-Manville has sued does not by its terms purport to afford materialmen any right of action thereon or to have been entered into for their benefit. It does not by any of its terms contain a condition for their payment. The District Court Judge was therefore correct in his judgment that the Bonding Company was entitled to judgment as a matter of law and the judgment should be affirmed.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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Three copies of the foregoing brief were delivered this ..... day of March, 1968, to:

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Gary G. Keltner

No. 22,290

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHNS-MANVILLE SALES CORPORATION,
a Delaware corporation,

Appellant,

vs.

ELLSWORTH H. EWALD, aka E. H. EWALD,
dba EWALD CONTRACTING COMPANY, and
RELIANCE INSURANCE COMPANY, a Pennsylvania
corporation, as successor in interest to
Standard Accident Insurance Company
a Michigan corporation,

Appellees.

REPLY BRIEF OF APPELLANT JOHNS-MANVILLE SALES CORPORATION

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SUBJECT INDEX

TABLE OF AUTHORITIES

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SECONDARY AUTHORITY

No. 22,290

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Appellees.

REPLY BRIEF OF APPELLANT JOHNS-MANVILLE SALES CORPORATION

ERRATUM

Before replying to Appellee's brief, Appellant would like to direct the Court's attention to a typographical error which appears at page 18, line 5 of Appellant's Opening Brief. Use of the word "because" in that line was erroneous; the word "became" should be inserted in place of "because."

APPELLANT'S REPLY

In its Opening Brief, Appellant set forth three theories under each of which it was, as a third party beneficiary of the bond and contract incorporated therein, entitled to judgment as a matter of law. These three theories were as follows.

1. The Arizona Supreme Court's decision in *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956) compels a ruling that the performance bond was converted, by virtue of Article 11 of the Contract and the Award of Bid Letter which were specifically incorporated into the bond and made a part thereof, into a performance and payment bond for Appellant's benefit and Appellant was therefore entitled to recover on this bond.

2. Appellant, by supplying material to a contractor for installation on public property became entitled, under the authority of *Webb v. Crane Company,* 52 Ariz. 299, 80 P.2d, 698 (1938), to recover on the performance bond because the bond contained a condition for Appellant's benefit and because the same public policy considerations which led the Court in *Webb* to allow a materialman to recover on the contractor's performance bond there are also present here.

3. Even if the bond was strictly a performance bond, Appellant, as a third party beneficiary thereof, was entitled to recover on the bond because the contractor, by failing to post a performance and payment bond and by failing properly to furnish the goods called for under the contract, did not fully perform the contract, full performance of which was guaranteed by the bond.

Appellee in its brief introduced nothing to disprove Appellant's right to recover under any of these three theories.

ARGUMENT ONE

DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS REVERSIBLE ERROR WHERE A FINAL JUDGMENT WAS ENTERED, THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT AND APPELLANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Appellant agrees with Appellee that, as a general rule, an order denying a Motion for Summary Judgment is an interlocutory, nonappealable order. This general rule is not, however, applicable here where there were cross-motions for summary judgment and, pursuant to Appellee's motion, a final judgment, rather than a simple interlocutory order, was entered.

There are no genuine issues of material facts here. Neither party has contended that there are. Hence, there is nothing to be gained from an order simply reversing the trial court's judgment for Appellee and remanding the case for trial. There are no facts to be tried. Under these circumstances, if this Court is persuaded that there exist no genuine issues of material fact and that Appellant is entitled to summary judgment as a matter of law, it can and should enter an order reversing the judgment of the trial court and directing that judgment be entered for Appellant on its Second Motion for Summary Judgment. See 6 J. Moore, Federal Practice, 56.13, at 2251-52 (2d ed. 1965).

ARGUMENT TWO

UNDER ARIZONA LAW, A CONTRACT INCORPORATED INTO A BOND MUST REVEAL ONLY THAT THE PARTIES INTENDED THE CONTRACT TO BENEFIT A THIRD PERSON OR SOME CLASS OF WHICH HE IS A MEMBER IN ORDER TO GIVE THE THIRD PARTY A RIGHT TO SUE ON THE BOND.

Appellee asserts in argument II A of its brief that under Arizona law a third person can recover on a contract only if the

contract reveals that the parties intended to give the third party a direct right of action on the contract. This assertion is incorrect. To recover on a bond or contract under Arizona law, a third party must show only that the contract reveals that the parties to it intended that the third party should benefit directly from the contract. If the contract reveals such an intention, the third party is, as a matter of law, entitled to sue the surety and recover on the bond. *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956); *Webb v. Crane Co.,* 52 Ariz. 299, 80 P.2d 698 (1938); *Ed Stearman and Sons, Inc. v. State ex rel. Union Rock and Materials Co.,* 1 Ariz. App. 192, 400 P.2d 863 (1965).

These three cases are the only Arizona cases dealing with a third party's attempt to reach a performance bond and, in each case, the criterion for recovering was whether the contract and/or bond contained conditions for the third party's benefit, his right to sue on the bond following as a matter of law if a condition for his benefit was found. Hence, Appellee's assertion that the contract must reveal an intent to give the third party a right of action on the contract is misleading and incorrect.

Appellee's third argument, on pages 12-13 of its brief, is similarly erroneous. There, Appellee asserts that:

> In the case of surety bonds, the requisite intention to benefit third-party materialmen must, in the absence of an express provision that the bond is for their benefit, be manifested by a condition for their direct payment.

However, none of the three Arizona cases dealing with a third party's rights under a performance bond requires that the intent to benefit third persons be manifested either by an express provision that the bond is for their benefit or a condition for their direct payment. On the contrary, the Supreme Court merely stated in *Porter* that:

> In order that a suit be maintainable on a contractor's bond by or for the use of a materialman the bond must be construed so as to include the materialman within its coverage,

i.e., to give him some beneficial interest therein. *Porter v. Eyer,* 80 Ariz. 169, 171, 294 P.2d 661, 662 (1956).

This statement as to how the requisite intent must be manifested is not nearly as severely limited as Appellee contends in its third argument. Nowhere did the Arizona Supreme Court in either *Porter* or the *Webb* case, decided earlier, limit third parties in surety cases to only two methods of proving an intent to benefit third parties. For, not only did the court in *Porter* set forth the much more general requirement that the third party show that the bond was intended "to give him some beneficial interest," but the Court found that the statutory requirement that the contractor post a performance and payment bond was a sufficient expression of intent to benefit materialmen to enable them to sue on the bond and recover from the surety. Likewise, in *Webb*, the Court did not even intimate that proof that the bond contains a condition for the putative third party's benefit must be accomplished by one of the two methods which Appellee now asserts are essential. Instead, the Court held only that in order to recover on the bond as a third party beneficiary thereof, the materialman must show, by any means available, that the bond contains a condition for his benefit.

Several additional points must be made concerning Appellee's third argument. First, after supposedly limiting its discussion to Arizona cases involving surety bonds, Appellee asserts that "contracts lacking *both* an express statement of intention to benefit third persons *and* a promise to pay them directly have been held to afford materialmen no right of action thereon." (Appellee's Brief 13.) Yet, none of the cases cited in support of this assertion is a surety case.

Second, in argument III A, Appellee states that the bonds involved in *Webb* and *Stearman* were statutory bonds which were by their express terms conditioned on payment of materialmen. Appellee then asserts that since the instant bond was not a statutory bond, legislative intent has no place in its construction.

Appellant, of course, agrees with both of these assertions. Appellant has never contended that the statutory bonds in *Webb* and *Stearman* were not conditioned on payment. Appellee, however, has not responded to Appellant's argument regarding the manner in which the *Webb* case relates to the instant case.

Briefly, Appellant utilized *Webb* to demonstrate that application of the type of reasoning and public policy considerations enunciated in *Webb* to the facts presented by the instant case would establish two points. First, the contract incorporated into the bond in the instant case was, as a matter of law, intended to benefit third parties such as Appellant. In addition, the type of public policy considerations which encouraged a holding that the subcontractor's materialmen in *Webb* should be allowed to recover on the contractor's performance bond were present in the instant case, since the work involved here was done on public property. Consequently, the *Webb* rationale affords a second, independent grounds for holding, as a matter of Arizona law, that Appellant was a third party beneficiary of the contract and bond involved herein and entitled to recover on the bond and contract. Appellee did not, however, address itself to this interpretation and use of *Webb.*

Finally, Appellee states at page 17 of its brief that the bond involved in the instant appeal is "conditioned only upon 'performance' of a contract whereby the contractor is to 'furnish' materials . . . ." and that it is, therefore, similar to the bond involved in *Porter* without benefit of the statute which the Court read into the *Porter* bond. This assertion overlooks the fact that the contract also required the contractor to furnish a performance and payment bond and that the contract was expressly incorporated into the bond and made a part thereof. With this contractual requirement read into the bond, this bond, like the bond in *Porter,* became conditioned on payment as well as performance and Appellant is entitled to recover on it as a third party beneficiary.

ARGUMENT THREE

ARTICLE 11 OF THE SPECIFIC JOB CONTRACT AND THE AWARD OF BID LETTER WHICH WERE EXPRESSLY INCORPORATED INTO THE BOND AND MADE A PART THEREOF CONVERTED THE PERFORMANCE BOND INTO A PAYMENT BOND UPON WHICH APPELLANT CAN RECOVER.

In its first three arguments, Appellee completely ignores the fact that by article 11 of the contract the telephone company was given the option of requiring that a performance and payment bond be executed and that, by the Award of Bid Letter, this option was exercised and a performance and payment bond was contractually required. Consequently, in its first three arguments Appellee consistently characterizes the contract and bond as requiring *only* that Ewald "furnish" certain materials. Not until argument IV does Appellee purport to deal with the uncontroverted fact that the contract, by virtue of the Award of Bid Letter which was incorporated therein, required Ewald, the contractor, to execute a performance and payment bond.

In its fourth argument, Appellee asserts that the performance bond could not have been converted into a performance and payment bond. Appellee offers no analytical reasons as to why the bond, by expressly incorporating the contract into the bond and making it a part thereof, could not have been converted into a performance and payment bond. Instead, Appellee supports its position by citing and quoting from several anachronistic federal decisions and one old Rhode Island opinion. Only two of the federal decisions and the Rhode Island case are actually relevant to the instant problem.

In the relevant federal cases, *Babcox & Wilson v. American Surety Company,* 236 Fed. 340 (8th Cir. 1916), and *United States ex. rel. Stallings v. Starr,* 20 F.2d 801 (4th Cir. 1927), materialmen were suing on contractor's performance bonds. The bonds did not contain any payment conditions but both bonds

were executed at a time when a federal statute required that on all government jobs of the type involved in each case, the contractor must give a performance *and* payment bond. In each of these cases, however, the Court refused to read into the bond the statutory requirement that the bond given by the contractor contain payment provisions protecting the materialmen. According to the Court of Appeals for the Fourth Circuit, the statute could be read into the bond only if the statute expressly provided that its provisions were to be read into the bond. "But, in the absence of some such statutory provision, the Court will not read into a bond a [statutory] obligation which it [the bond] did not contain." *United States ex rel. Stallings v. Starr, supra* at 805.

This holding is no longer good law. Even Appellee concedes in argument III B that the provisions of a statute requiring a bond are, as a matter of public policy, read into bonds executed pursuant to the statute. Consequently, Appellee's federal cases, which stand for the proposition that statutory provisions cannot be read into statutory bonds unless the statute expressly provides that they shall be, are not valid statements of contemporary law. And, since the instant case is to be determined with reference to Arizona law, the Arizona Supreme Court's contrary decision in *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956), is controlling.

As pointed out in Appellant's opening brief, the Arizona Supreme Court specifically held in *Porter* that statutory provisions in force at the time a statutory bond is executed are read into the bond as a matter of law. *Porter v. Eyer, supra* at 172, 294 P.2d at 663. Therefore, not only are the federal cases which Appellee relies on in support of its fourth argument no longer valid authority for the general proposition asserted, the conclusion they reach has also been specifically repudiated by the Arizona Supreme Court.

The Rhode Island case, *Glens Falls Indemnity Company v. American Awning & Tent Company,* 55 R.I. 284, 180 Atl. 367 (1935), is quite similar to the case presently before the Court

and its holding is directly contrary to the holding which Appellant asks this Court to make. However, Appellant contends that the *Glens Falls* decision is inconsistent with the Arizona decisions involving attempts of materialmen to reach a contractor's performance bond. There can be no doubt that the Arizona Supreme Court would, in light of its earlier decisions involving suretyship law, (see Appellant's Opening Brief pp. 16-21) reach a conclusion contrary to the Rhode Island holding.

The Rhode Island Court expressly refused to accept as controlling the same public policy considerations, also present in the instant case, which greatly influenced the Arizona Court's decision in *Webb*. Compare the Rhode Island Court's discussion of the policy considerations, 180 Atl. at 374, with the Arizona Court's discussion in *Webb v. Crane Company, supra* at 307-10, 80 P.2d at 703-04. The Rhode Island Court's requirement that there must be a provision containing a "specific undertaking to pay for labor and materials" which must "positively appear" within the bond or contract, 180 Atl. at 369, is a much more restrictive, stringent requirement than the Arizona Court's requirement that the bond or contract contain "a condition for their benefit." *Webb v. Crane Co., supra* at 310, 80 P.2d at 704.

Both parties to this appeal have agreed that it must be determined in accordance with Arizona law. Therefore, Appellee's antiquated cases from other jurisdictions which are contrary to Arizona law are totally irrelevant to the resolution of this appeal. Furthermore, the type of reasoning utilized in Appellee's cases was also rejected by the Arizona court in *Porter*. The Court held there that a mere performance bond could be and was converted into a payment bond because a statute requiring that a payment bond be executed had to be incorporated into the bond and it thereby became conditioned on payment as well as performance. Since the bond involved in the instant appeal specifically incorporated the contract, and since the contract required that a performance and payment bond be executed, *Porter* compels a

ruling that the Appellee's performance bond was, as a matter of law, also conditioned on payment. To paraphrase the Court's language in *Porter,* "we may presume that the intention of the parties was to execute such a bond as the . . . [contract] required." *Porter v Eyer, supra* at 173, 294 P.2d at 664. Appellee is, therefore, bound by the intent of the parties as reflected in the bond and contract and this intent is, as a matter of law, an intent to benefit third party materialmen such as Appellant. See discussion and cases in Appellant's Opening Brief, pp. 16-21.

ARGUMENT FOUR

APPELLANT IS ALSO ENTITLED TO RECOVER ON THE PERFORMANCE BOND BECAUSE THE BOND WAS INTENDED TO BENEFIT APPELLANT, AND EWALD, BY NOT FURNISHING A PERFORMANCE AND PAYMENT BOND AND BY NOT FURNISHING MATERIAL AS CONTEMPLATED BY THE CONTRACT, BREACHED TWO CONDITIONS OF THE CONTRACT, FULL PERFORMANCE OF WHICH WAS GUARANTEED BY THE BOND.

Appellee's fifth argument is to the effect that even though Ewald did not fully perform the contract, performance of which was guaranteed by the bond, Appellant cannot recover on the bond because it was not the obligee thereof. This argument completely overlooks the whole concept of third party beneficiary law by virtue of which a third party can acquire enforceable rights in a contract to which it was not a party or, more specifically, enforceable rights in a bond in which it was not the named obligee. Appellant demonstrated in its Opening Brief that under Arizona law a third party can recover on a contract or a bond to which it was not a party if it establishes that either document was intended to benefit it or a class of which it is a member, or if either document contains a condition for its benefit. Appellant also demonstrated that the bond and contract involved in the instant appeal did, as a matter of law, reveal an intent to

benefit Appellant so that it can recover thereon. Accordingly, since the contract incorporated into the bond contained several conditions for Appellant's benefit, these instruments were, in legal contemplation, intended to benefit Appellant. As Ewald, the principal on the bond, did not fully perform on the bonded contract, Appellant can recover on the bond as a third party beneficiary thereof.

CONCLUSION

Appellee has not, in most of its arguments, dealt with the facts presented by this appeal. Nor has it analyzed the cases upon which it relies or applied those cases to the facts actually presented. In its only argument which does deal with the fact that a performance and payment bond was contractually required, Appellee has relied on cases and reasoning which have been rejected by the Arizona Supreme Court even though Appellee has conceded that Arizona law must determine the outcome of this appeal.

Appellant has demonstrated that the bond and contract upon which this suit is grounded were, as a matter of law, intended to benefit Appellant. Appellant has also shown that the bond involved herein was, as a matter of Arizona law, conditioned on both performance and payment. In addition, Appellant established in pages 19-21 of its Opening Brief that Arizona public policy favors protecting materialmen who furnish supplies on public projects which cannot be liened by letting them recover on performance bonds if the bonds, like the instant one, contain a condition for the materialman's benefit. Appellee did not deal with this contention at all. Finally, Appellant has shown that the performance bond involved here was, as a matter of Arizona law, intended to benefit Appellant so that the principal's nonperformance of the contract renders the Appellee liable to Appellant on its surety bond.

Under any of these three theories, Appellant is, as a matter of law, entitled to recover on the bond. Therefore, Appellant

respectfully requests that this Court enter an order reversing the judgment entered by the District Court and directing that judgment be entered for Appellant on its Second Motion for Summary Judgment.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief complies with those rules.

_____
Earl E. Weeks

I certify that I delivered three copies of the foregoing brief this _____ day of _____, 1968 to:

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No. 22,295

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LABORERS & PLASTER TENDERS, LOCAL 507,

Respondent.

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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Respondent.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of

[1] The pertinent statutory provisions are reprinted, *infra*, pp. A-1 to A-2.

its order (R. 19, 28-29),[2] issued on January 4, 1967 against respondent. The Board's decision and order are reported at 162 NLRB No. 55. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at La Mirada, California, within this judicial circuit. No jurisdictional issue is presented.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening the president of a neutral employer with an object of forcing him to cease doing business with the primary employer (R. 14-20, 27-28). The Board's findings may be summarized as follows:

Kon Lee Building Company (hereinafter "Kon Lee"), a California corporation in the building construction industry, was, at all material times, a general contractor engaged in the construction of a 158-bed hospital at La Mirada (R. 15). S & H Concrete Construction Inc. (hereinafter "S & H"), whose employees are represented by respondent Laborers, was hired as a specialty contractor by Kon Lee to perform cement work at the hospital project in the spring of 1966 (*ibid.*). On April 13, 1966, the Building and Construction Trades Council of Los Angeles (hereinafter "Council"), which represents employee members of affiliated organizations, including respondent Laborers, began picketing the project with signs which read (R. 15; Tr. 6):

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[2] References designated "R." are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testimony reproduced, pursuant to Court Rules 10 and 17. References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

> Kon Lee Bldg. Co., Unfair to Los Angeles Building and Construction Trades Council, AFL-CIO - No Agreement

S & H employees reporting for work that day refused to cross the picket line, and called the president of S & H, Henderson, for instructions (R.16; Tr. 9). Henderson, after calling a business agent of respondent Laborers and ascertaining that there was a picket line at the project directed against Kon Lee, ordered his employees not to work (R. 16; Tr. 9-10).

The next day, Kon Lee established a reserved gate at the Liutweiler Avenue entrance to the project, at which the following sign was posted (R. 15: Tr. 6).

> Notice: All persons, contractors, their employees, and their suppliers must use this entrance and exit for work or deliveries to and from job sites except Kon Lee Building Company and their suppliers, who must use the entrance located one block east on Los Coyotes Avenue - Signed, Kon Lee Building Company, General Contractor.

At the Los Coyotes Avenue entrance, a sign was posted reading (R. 16; Tr. 6-7):

> Notice: This entrance is for the sole and exclusive use of Kon Lee Building Company and their suppliers. All other persons must use entrances located one block west on Liutweiler Avenue - Signed, Kon Lee Building Company, General Contractor.

Kon Lee informed Henderson that the reserved gate had been established, and asked him to send his men back to work. Henderson did so after verifying that there was no picket line at the reserved gate (R. 16; Tr. 11).

A day or two later, Frank Fuentes, a business agent for the Laborers, called Henderson, informed him that he and his men had been observed working at the project, and warned him that because they had "crossed the picket line" Henderson was "liable for each man. Each man is liable for a $200 fine." (R. 16, 17; Tr. 14, 29). Fuentes then put his superior, Graves, on the line; Graves said that "if there was no picket on the job . . . no one could stop [the employees] from working." (R. 18; Tr. 30).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening the president of S & H in order to put pressure on S & H to cease performing work for Kon Lee. The Board's order requires respondent to cease and desist from the unfair labor practice found and to post the usual notice.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT RESPONDENT VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT

Section 8(b)(4)(ii)(B) of the Act provides, in relevant part, that it is an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * *

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * .

Section 8(b)(4) thus renders unlawful the implication of neutral employers in disputes not their own where an object is to force the cessation of business relations between the neutral employer and any other person. "The impact of the section is directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.' *International Brotherhood of Electrical Workers v. N.L.R.B.*, 181 F. 2d 34, 37." *Local 761, International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 366 U.S. 667, 672.

Two elements are necessary in order to find a violation of Section 8(b)(4)(ii)(B): first that a labor organization or its agents must "threaten, coerce or restrain" an employer; and second, that an object of its conduct must be the cessation of business between two employers. Regarding the latter element, "[t]he Union's 'object' may be inferred from its acts." *New York Mailers Union No. 6 v. N.L.R.B.*, 316 F. 2d 371, 372 (C.A.D.C.); *See also, Local 761, IUE v. N.L.R.B.*, 366 U.S. 667, 674. Since the only dispute involved herein was that between the Council and Kon Lee, it can hardly be disputed that an object of respondent's conduct was to force or require S & H, a neutral employer, to cease doing business with the primary employer, Kon Lee.

Nor can there be any doubt that respondent's threat to fine S & H employees for crossing the picket line constituted "coercion" within the meaning of the Act. The legislative history

of Section 8(b)(4)(ii)(B) shows that Congress intended to foreclose not only force, violence and picketing as means of pressuring a neutral secondary employer, but also threatening him "with labor trouble or other consequences"[3] or "with a strike or other economic retaliation."[4] See *N.L.R.B. v. Local 825, Operating Engineers*, 315 F. 2d 695, 696-698 (C.A. 3); *N.L.R.B. v. Highway Truck Drivers & Helpers, Local No. 107*, 300 F. 2d 317, 320-321 (C.A. 3); *N.L.R.B. v. District Council of Painters No. 48*, 340 F. 2d 107, 110-111 (C.A. 9), cert. denied, 381 U.S. 914. As the Supreme Court has noted, "the prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. (Tree Fruits)*, 377 U.S. 58, 68.

The coercive nature of respondent's conduct in this case is clear. Union business agent Fuentes specifically told S & H president Henderson that his men were each "liable for a $200 fine" for crossing the picket line.[5] Union official Graves stated to Henderson that no one could stop the employees from working if there was no picket at the site. Coupled

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[3] II Leg. Hist. 1586(2) (105 Cong. Rec. 15552).

[4] *Id.*, at 1523(1) (105 Cong. Rec. 14347, 15544-15545).

[5] The evidence supporting the Trial Examiner's finding on this point stands without contradiction on the record, due to respondent's failure to produce any witnesses in rebuttal. Respondent's assertion that it was deprived of an opportunity to present any rebuttal evidence (R. 33) is patently without merit. The record reveals that one of respondent's witnesses was allegedly in the hospital and unable to appear at the hearing (Tr. 13). However, the Trial Examiner offered to take his testimony at the hospital, if possible (*ibid.*). Respondent ignored this offer, and subsequently rested its case without adverting to the matter again (Tr. 58). Under these circumstances, it cannot now successfully maintain a claim of denial of due process.

together, these statements carried the unmistakable implication that the Union would order S & H's employees to cease working or threaten them with disciplinary action if they continued to work while the site was being picketed. The Board has pointed out that such conduct "amounts to a threat by the [Union] . . . that [it] would induce its members not to work for [the neutral subcontractor] while the picket line was in existence. Moreover, it is clear that this conduct goes beyond normal persuasion since [the neutral subcontractor] was faced with a possible loss of its contract and a suit for breach of contract if it was unable to complete its work because of inability to obtain needed [union employees]." *Carpenters Local Union No. 994, et al. (Interstate Employees Association)*, 159 NLRB 563, 566. Respondent's threat of economic action against Henderson in this case similarly constituted coercion within the meaning of Section 8(b)(4). See *N.L.R.B. v. District Council of Painters No. 48*, *supra*, at 111 (C.A. 9), cert. denied, 371 U.S. 914; *N.L.R.B. v. Local 825, Operating Engineers*, *supra*, at 697-698; *N.L.R.B. v. Local 3 IBEW (New York Telephone Co.)*, 325 F. 2d 561, 562 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.[6]

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February 1968.

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[6] That respondent's conduct consisted of only one incident and that the picket line no longer exists does not render moot the Board's remedial order. For, "the determination of what constitutes serious harassment of an employer is one which the Board is competent to make, and falls in an area where the Courts should 'defer to the expertise of the Board to accept its determination that the violation is not *de minimis* and that there [is] a resultive injury or prejudice.' *N.L.R.B. v. Dal-Tex Optical Co.*, 310 F. 2d 58, 62 (C.A. 5)"; *Bakery Wagon Drivers & Salesmen, Local Union No. 484 v. N.L.R.B.*, 321 F. 2d 353, 356 (C.A.D.C.). It cannot be said that "there was no danger of recurrent violation . . . and that the Board was not justified in concluding that under all the circumstances, it was desirable to add the sanction of its order . . ." *Local 1967, United Brotherhood of Carpenters & Joiners of America v. N.L.R.B.*, 357 U.S. 93, 97, n. 2; *N.L.R.B. v. Local Union No. 751, United Brotherhood of Carpenters & Joiners of America AFL-CIO*, 285 F. 2d 633, 638 (C.A. 9).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Section 8

(b) It shall be an unfair labor practice for a labor organization or its agents --

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(b) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make the enter and decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency,shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

EXHIBITS

NUMBER	FOR IDENTIFICATION	IN EVIDENCE
General Counsel's		
1(a) through 1(i)	5	5

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,296

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS UNION LOCAL 180,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO,

Respondent.

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat.

136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 68-69)[2] issued against respondent on January 16, 1967, and reported at 162 NLRB No. 92. This Court has jurisdiction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred in Vallejo, California.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the respondent violated Section 8(b)(2) and (1)(A) of the Act by refusing in the operation of an exclusive employment referral system to register three members of sister locals on its out-of-work list promptly upon their request for such registration. The evidence upon which the Board based its findings is as follows:

Paul C. Allen and Richard A. Allen, father and son, are millwrights by trade. They reside in Sacramento, California, and hold membership in Sacramento Carpenters' Local No. 1051, a sister local of the respondent local (R. 24; Tr. 17, 105). On the morning of August 23, 1965,[3] between 9:30

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[1] The pertinent statutory provisions are set forth in Appendix A, *infra.*

[2] References designated "R" are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. "Tr." references are to the reporter's transcript of testimony as reproduced in Volume II of the record. References to the General Counsel's exhibits are designated "G.C. Exh."

[3] All events described hereinafter occurred during 1965.

and 10:00 a.m., the Allens went to respondent's hall in Vallejo, California, to register for work. Paul Allen told respondent's then financial secretary, Lloyd M. Johnston, that he and his son were millwrights and would like to get on the out-of-work list (R. 24; Tr. 18, 105). Johnston told the Allens that he could not put them on the list, that they would have to talk with Business Representative Leshe, and "that was up to Mr. Leshe" to do (R. 25; Tr. 21). When Paul Allen protested, Johnston declared, "I will put your names down on a piece of paper, and if Mr. Leshe wants you to go to work and puts you on the out-of-work list, that's his job . . . I am only doing as I am told" (R. 24; Tr. 19). Financial Secretary Johnston thereupon wrote the names of both Allens, together with their telephone numbers, on a small piece of "scratch" paper which he posted on the wall (R. 24; Tr. 19, 118).

Johnston also told the Allens that respondent regularly referred millwrights to available jobs from its out-of-work carpenter list; but that there were no out-of-work millwrights currently registered (R. 25; Tr. 21, 106). When the Allens requested a chance to see respondent's out-of-work list, Johnston said the local did not "give . . . out" the list (R. 25; Tr. 21, 22, 107). When questioned by the Allens regarding American Home Products' Vacaville, California, construction project, Johnston stated that there would be work for millwrights, but that such work would not be ready for awhile. Upon leaving respondent's hall, the Allens visited the Vacaville job site and were told that the millwright work would start several weeks later (R. 25; Tr. 22, 48, 106).

On the morning of August 30, at approximately 9:30 or 10:00 a.m., the Allens, together with Dick J. Look, another Sacramento resident and Local 1051 member, visited respondent's hall. Look, with both Allens close behind, spoke to McGrogan, the new financial secretary. After asking for Leshe and learning that he was not in, Look asked to see the out-of-

work list and his request was denied (R. 25, 26; Tr. 169). He then asked to sign the out-of-work list but McGrogan said, "No, you can't sign the out-of-work list unless you deposit your book with this local . . . Well, this is the way we run things here" (R. 26; Tr. 59, 108-109). McGrogan, however, took Look's name and telephone number and added them to the posted piece of paper which Johnston had used, one week previously, to record the Allens' names.

Paul Allen, then, likewise asked to see respondent's out-of-work list, but McGrogan refused, stating, "I don't show the out-of-work list to just everybody" (R. 26; Tr. 169). He added, "It is up to Bill Leshe as to whether you go to work and [to] put you on the out-of-work list." McGrogan also stated that he could only add the names of Local 180 members to the list, and that the Allens and Look would have to "put their books in" with respondent, *i.e.*, transfer their memberships, in order to get on respondent's out-of-work list (R. 26; Tr. 26, 109).

When they left respondent's hall, the Allens and Look drove to the Vacaville project site. There they spoke with Merle Ross, Golden State Runway's[4] millwright foreman, regarding the possibility of work. Ross declared that he would

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[4] Golden State Runway and Engineering Company (herein Golden State) was a subcontractor on the Vacaville site, engaged in manufacturing and installing conveyors for a food processing plant that was under construction. The general contractor was Bigge Drayage Company, which, through its membership in the regional chapter of Associated General Contractors, Inc., is party to a labor agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO on behalf of the latter organization's district councils and local unions

(continued)

be hiring millwrights very shortly (R. 27; Tr. 27, 90). The three men told Ross that they had left their names at respondent's hall. Ross had previously known Look, and had Look's name recorded in a notebook; he added both Allens' names to his book. Ross told the men that he would determine where their names were on respondent's registration list; further, he promised to discuss their hire with Leshe. He pointed out, however, that since he had done no prior work within respondent's trade jurisdiction, he could not request respondent to dispatch particular men by name (R. 27; Tr. 27-28, 89-90, 110).

Later in the day, after the Allens and Look left respondent's hall, Arthur D. Cook, a member of a sister local, reported in search of millwright work (R. 27; Tr. 135). Cook first spoke with McGrogan, who referred him to Leshe, who was then present. Cook asked Leshe about millwright's work but Leshe replied that he had men available. Cook then asked whether Leshe would have any objection if he deposited his book with respondent. When Leshe stated that he had no objection, Cook "put in" his book and left the hall. Cook's name was promptly added to respondent's out-of-work list (R. 27; Tr. 136).

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[4] (continued from preceding page)

in Northern California (R. 23, 24; Tr. 10; G.C. Exh. 2). Golden State, in its subcontract with Bigge Drayage, agreed to be bound by all the terms of the AGC Carpenters Agreement, which includes, *inter alia,* an exclusive referral system whereby upon request from a construction contractor for a carpenter or millwright the local union with appropriate geographic jurisdiction is obligated to dispatch a "qualified and competent" workman (R. 24; Tr. 10, 13; G.C. Exh. 2, Sec. IV, pp. 4-6; G.C. Exh. 6, Sec. 19A).

During the late afternoon of August 30, Golden State's foreman, Ross, visited respondent's hall and spoke with Leshe (R. 27, 28; Tr. 91). With respect to Golden State's need for millwrights, Ross expressed his understanding that, since he had done no prior work within respondent's jurisdiction, he had no right to request men by name and was required to obtain all his millwrights through Local 180; Leshe concurred in this understanding (R. 28; Tr. 91-92). Ross inquired whether Look's name was near the top of respondent's list, stating that he would like to hire Look through the work list because he knew him to be a good man. Leslie replied that while he knew of Look's availability, he had other men who were ahead of Look, that he had already "figured out" those men who would be "good" for Golden State's project, and that there was not much chance that Ross could get Look dispatched at that time (R. 28; Tr. 92, 100). Ross finally merely told Leshe that he needed "two millwrights" forthwith, and Leshe replied that he had two men who would be dispatched (R. 28; Tr. 99, 102).

Within the next two days, respondent did dispatch two millwrights, Arthur D. Cook and Onest Wadley, pursuant to Ross' request. Thus, during mid-morning on August 31, at about 10:00 a.m., Cook, while visiting the State Employment Service office, received a telephone call from his wife reporting that respondent Local had "called" him (R. 30; Tr. 137). Cook reported to respondent's hall and McGrogan dispatched him to Golden State's Vacaville project. He reported for work at noon, and promptly went on the payroll. There were no other millwrights then at work except for Foreman Ross (*Ibid.*). On August 30, Onest Wadley, a member of respondent, was working as a carpenter with the Jordan Company on the Vacaville project. Wadley was told that respondent had a millwright position for him, and that a clearance or dispatch slip would be mailed to him forthwith (R. 29, 30; Tr. 216-217, 247-248).

On September 7, the Allens and Look visited the Vacaville project, and noted that there were two millwrights, presumably Cook and Wadley, at work. They asked Foreman Ross why they had not been called for work. Ross replied that he had visited respondent's hall "to get [them] to go to work" but had been told that respondent had two men ready for dispatch. Ross added that one of the men turned out to be Cook, who had just deposited his book with respondent and had procured his dispatch the next day (R. 30, 31; Tr. 28-30). Further, Ross told Look that he had not found the latter's name on respondent's out-of-work list (R. 31; Tr. 63).

Upon leaving the job site, Richard Allen returned home and telephoned Leshe about 10:00 that morning. Allen asked Leshe "how come our names wasn't on this [out-of-work] list?" (R. 31; Tr. 111). Allen was told that the separate "piece of paper" record, containing his name and telephone number, put him in a position just as good as, or better than, the position that registered job seekers had, so that, for practical purposes, he could consider himself registered for work (R. 31; Tr. 225-226). When Allen continued to protest the fact he was not formally registered, Leshe claimed that the reason was because he [Allen] was concurrently registered for work with two or three of respondent's sister locals (R. 31; Tr. 213).

During the morning of September 8, Richard Allen filed the charge initiating this case. That afternoon, both Allens and Look personally served respondent with a copy of the charge, which, then, specifically designated only Richard Allen as having been subjected to respondent's unfair labor practices (R. 32; Tr. 163-164, 182). Sometime during the morning on September 10, Paul Allen went to Oakland Local 102 and withdrew his membership book. He proceeded to respondent's hall

to deposit the book, presumably so that he could qualify for dispatch to millwright work at the Vacaville project. When he saw McGrogan Allen declared, "I would like to put my book in this local" (R. 33; Tr. 31). McGrogan replied, "Just a minute. Mr. Leshe is here. He will talk to you" (R. 33; Tr. 31). Leshe, holding a copy of Richard Allen's original charge, approached Paul Allen and engaged in a "heated discussion" during which Leshe proclaimed that Allen had a lot of "gall to bring his book down" in view of the charges that had been filed against respondent (R. 33; Tr. 191). After some continued "raving and ranting and cussing" by Leshe, Allen picked up his book and other papers and left the hall (R. 33; Tr. 31-32).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that respondent, by refusing to register the applicants for work promptly upon their request for such registration, did so because of their failure or refusal to become members of respondent, and, thereby, violated Section 8(b)(1)(A) and (2) of the Act.

The Board ordered respondent to cease and desist from the unfair labor practices found. Affirmatively, the Board's order requires respondent to make whole the Allens and Look for any loss of pay they may have suffered as a result of the discrimination which respondent caused to be practiced against them. The order also requires the Union to send and post the customary notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT RESPONDENT DISCRIMINATED AGAINST THE ALLENS AND LOOK, MEMBERS OF A SISTER LOCAL, BY REFUSING TO REGISTER THEM FOR EMPLOYMENT PROMPTLY UPON THEIR REQUESTS, WITH RESULTING LOSS OF JOB OPPORTUNITIES, THEREBY VIOLATING SECTION 8(b)(2) AND (1)(A) OF THE ACT

It is settled law that a union and its agents violate Section 8(b)(2) and (1)(A) of the Act when, under an exclusive hiring hall arrangement with an employer, it accords its own members preference in registration and job referrals over nonmembers or, as in this case, members of sister locals seeking to use its hiring facilities. *N.L.R.B. v. International Brotherhood of Electrical Workers, Local Union 340,* 301 F.2d 824 (C.A. 9); *N.L.R.B. v. Hod Carriers' and Common Laborers' Union, Local 300,* 336 F.2d 459 (C.A. 9); *N.L.R.B. v. Local 507, International Hod Carriers' Building and Common Laborers' Union,* 336 F.2d 460 (C.A. 9); *N.L.R.B. v. International Longshoremens' & Warehousemens' Union, Local 10,* 283 F.2d 558 (C.A. 9). As we show below, the record fully supports the Board's finding that respondent failed or refused to provide prompt, routine registration or dispatch to the Allens and Look, because they were not members of respondent, but of sister locals, and that this conduct was violative of the foregoing provisions of the Act.

The evidence shows that although there were no millwrights on the out-of-work list when the Allens sought to register on August 23, respondent's then-Financial Secretary, Johnston, told them that he could not personally register them, that only Leshe, Local 180's Business Representative,

could do that. The Allens, subsequently, returned to respondent's dispatch hall on August 30, accompanied by Dick Look, another sister local member. On this occasion, though there were still no millwrights on the out-of-work list (Tr. 256), they were denied registration by McGrogan, who stated that he could only add the names of Local 180 members to the list and that in order for the three of them to get on the list, they would have to "deposit" their books with respondent, that is, transfer their memberships. On both August 23 and 30, the complainants were refused permission to see the out-of-work list and their names and phone numbers were placed on a piece of "scratch" paper.

On the basis of these facts, plus Business Representative Leshe's testimony to the same effect, it is clear that respondent's practice is to require a personal confrontation between members of sister locals and Leshe before the former can be properly registered for work (R. 39; Tr. 222, 225). That this practice constitutes a significant deviation from the registration practices followed by many of respondent's Northern California sister locals is evidenced by Look's uncontroverted testimony that he had previously registered for work in several other sister locals in the region and on each occasion his request had been complied with. Moreover, he stated that at no time had he been required to deposit his book prior to registration and that in most of them he could sign the list himself or else be registered without the business representative being present (R. 39; Tr. 48, 49, 50, 51).

That such disparate treatment tended to promote a preference for Local 180 members in the referral and dispatch to jobs is clearly evidenced from the events following August 30. On August 31, subsequent to Golden State Foreman Ross' request for two millwrights, respondent dispatched Arthur Cook,

a newly transferred-in member who had registered *after* the Allens and Look were refused registration on August 30, as well as Onest Wadley, a member of Local 180 who was not then out of work and, therefore, not eligible to be on the list at the time of his telephone dispatch on August 30 (G.C. Exh. 2, 6(a) and 6(c) of Hiring Procedures).[5] Further, within two weeks thereafter, Local 180 dispatched two more millwrights to Golden State who were not on the out-of-work list when the Allens and Look attempted to register. One of them, Holley, hired on September 8, was a member of Local 180 and the other, McGuigan, hired on September 15, was a non-member who had applied for membership in Local 180 just before he was dispatched (R. 39; Tr. 81, 226-227). The record thus shows that absent respondent's unlawful refusal to register the Allens on August 23 and Look on August 30 because of their lack of membership in Local 180, these three men would have been eligible for dispatch to Golden State on August 31 (for the Allens) and September 8 (for Look).

Respondent contended, before the Board, that the requirement of a personal consultation with members of sister locals prior to registration was calculated to give Leshe a chance to dissuade such individuals from multiple job registrations for supposed "practical reasons" (R. 40; Tr. 222, 240). Leshe's account, however, of his conversation with Richard Allen on September 7 fails to support this assertion. For on that occasion, Leshe told Allen that he and his father were "*de facto*" registered as of August 30 and that he (Richard

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[5] Leshe, in seeking to explain away this favoritism shown Wadley, despite the latter's non-registration and non-eligibility, claimed that he had promised Wadley the first millwright job that became available (R. 29-30; Tr. 248).

Allen) was "better off" on the separate list rather than being formally registered, since this protected him against "delisting" for failure to be present in respondent's hall during dispatch hours (R. 31, 41; Tr. 218, 225, 226). Had that been the case, however, Leshe could have referred the Allens to Golden State pursuant to Foreman Ross' request on August 30 and the problems inherent in concurrent registration and conforming to respondent's dispatch rules would not have arisen.[6] Further, when Richard Allen insisted on registration on the out-of-work list, Leshe continued to refuse.[7] Respondent's claimed concern about multiple job registrations is further belied by the fact that when Cook, also a member of a sister local, appeared in respondent's hall on August 30 and offered to "put in" his book, thus transferring his membership to Local 180, Leshe made no inquiry as to Cook's possible concurrent registrations. Instead, he accepted Cook's book and promptly added his name to the out-of-work list.

In sum, we submit that there is substantial evidence indicating respondent's unlawful motivation, to wit, a purpose to prefer members of Local 180 or persons from other locals

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[6]The Trial Examiner, with the Board's affirmance, refused to credit Leshe's testimony that he tried to communicate with the Allens and Look by telephone, but without success, before Cook and Wadley were dispatched (R. 28-29).

[7]Despite his prior testimony evidencing his readiness to register an individual even though registered elsewhere if he persisted in his demands (Tr. 240, 255, 256), Leshe claimed Allen could not be physically present during dispatch hours. On cross examination, Leshe conceded that Local 180 has no rule denying registration to members who are concurrently registered in other locals, and that Allen could have chosen to be present at the appropriate dispatch hours (R. 31; Tr. 254, 255).

who transfer membership to Local 180.[8] Such preferences are reasonably calculated to cause, and do cause, discrimination with regard to such non-members' dispatch and hire with the consequent effect of discouraging retention of membership in sister locals, while encouraging membership in respondent. It is well settled that such union conduct is violative of Section 8(b)(2) and (1)(A) of the Act. See, *N.L.R.B. v. Local 507, International Hod Carriers' Building and Common Laborers' Union, supra,* 336 F.2d 460 (C.A. 9); *N.L.R.B. v. Local 269, International Brotherhood of Electrical Workers,* 357 F.2d 51, 55-56 (C.A. 3).

In *N.L.R.B. v. International Brotherhood of Electrical Workers, Local Union 340, supra,* upholding a Board finding that "the refusal to refer a member of a sister local was motivated by a desire to prefer members of Local 340, or other 'wireman's' locals, over members of 'railroad' locals," this Court recognized that "evidence tending to prove unlawful motivation must ordinarily be circumstantial in character. It is not expected that the officers or representatives of a union will record unlawful motivation in such a way as to constitute direct evidence." 301 F.2d at 825.

In sum, we submit that the record amply supports the Board's finding that respondent violated Section 8(b)(2) and (1)(A) of the Act by operating its exclusive hiring hall in such a manner as to discriminate against Paul and Richard

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[8] Leshe equated getting on the out-of-work list with transferring membership: ". . . getting on the list means transferring membership" (Tr. 262, 263). He was unable to name any sister local members who had been registered on the list without becoming members of Local 180 (Tr. 220, 221).

Allen and Dick Look because of their lack of membership in Local 180.[9]

II. THE BOARD PROPERLY REJECTED THE DEFENSE THAT IT SHOULD WITHHOLD STATUTORY RELIEF BECAUSE OF THE FAILURE OF THE COMPLAINANTS TO EXHAUST POSSIBLE REMEDIES UNDER CONTRACTUAL GRIEVANCE PROCEDURES

As an affirmative defense, respondent asserted that the failure of the employees to exhaust the contractual grievance procedures constituted reason for the Board to withhold relief under the Act.[10] As we show below, the Board properly rejected this contention.

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[9] In large part, the Board's conclusions herein represent evaluations as to credibility. *N.L.R.B. v. I.B.E.W., Local Union 340, supra,* 301 F.2d at 827. Concerning the credibility resolutions of a Trial Examiner, this Court has said: "Credibility is peculiarly the province of the Trial Examiner[and] his evaluation of oral evidence as reliable will not be disturbed unless the testimony which he credits is hopelessly or inherently incredible." *N.L.R.B. v. International Longshoremens' and Warehousemens' Union, Local 10, et al., supra,* 283 F.2d at 562.

[10] Section IV(B)(10) of the AGC Agreement (G.C. Exh. 2) provides that any person aggrieved by the operations of the hiring arrangements of Section IV has the right to submit, in writing, his grievance to a Joint Adjustment Board within ten days after the occurrence of the grievance. That Board has full power to adjust the grievance, and its decision thereon is final and binding upon the person submitting the grievance and all parties to the contract. Section VII (G.C. Exh. 2) sets out the entire machinery and composition of the Joint Adjustment Board for the settlement of grievances.

Congress and the courts have sought to ensure the enforcement of public rights guaranteed to individual employees, their unions, and their employers under the Act. Section 10(a) empowers the NLRB to prevent any person from engaging in an unfair labor practice with the proviso that, "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . ." The language of the Act itself, as well as the Court decisions affirming the Board's interpretation of this Section make clear that the jurisdiction of the Board to decide whether unfair labor practices have occurred may not be restricted by the availability of contract grievance adjustment procedures. *N.L.R.B. v. C & C Plywood Corp.*, 385 U. S. 421; *N.L.R.B. v. Acme Industrial Co.*, 385 U. S. 432; *N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (C.A. 7).[11]

Notwithstanding this national policy, and the Board's duty under the Act, to prevent and suitably remedy unfair labor practices, there is likewise a public policy favoring the voluntary adjustment of disputes arising over the application or interpretation of collective bargaining agreements.[12] The Board has sought to strike a balance between these two national goals in various types of cases in which arbitration has

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[11] "The superior authority of the Board may be invoked at any time." *Carey v. Westinghouse Elec. Corp.*, 375 U. S. 261, 272.

[12] See, 29 U.S.C., Section 173(d); *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564; *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 ("The Steelworkers Trilogy").

taken place, adopting a deference to arbitral results when the arbitration "proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082. However, the Board has emphasized that it has the "undoubted authority to adjudicate unfair labor practice charges" (*Raley's Inc.*, 143 NLRB 256, 257) and will withhold acting in a particular case only in an exercise of discretion. That this position of the Board is clearly in accord with the 1960 trilogy of cases involving Section 301,[13] appears from a more recent Supreme Court decision in *Local 174, Teamsters v. Lucas Flour Co.*. 369 U. S. 95. The Court, in *Local 174,* emphasized that its earlier decisions were in no way intended to deprive the Board of its jurisdiction, for as the Court specifically pointed out: "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the NLRB to remedy unfair labor practices as such." 369 U. S. at 101. Accord: *Smith v. Evening News Ass'n.*, 371 U. S. 195, 197.

It is thus settled that where the Board has jurisdiction over an unfair labor practice, the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board. The courts will not overturn the exercise of such discretion in the absence of a showing that the Board has abused it. *Haleston Drug Stores v. N.L.R.B.*, 187 F.2d 418, 421 (C.A. 9), cert. denied, 342 U. S.

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[13] See cases cited, *supra,* n. 12.

815; *Lummus Co. v. N.L.R.B.*, 339 F.2d 728, 732-733 (C.A. D.C.); *N.L.R.B. v. Hershey Chocolate Corp.*, 297 F.2d 286, 293 (C.A. 3); *Thor Power Tool Co., supra*, 351 F.2d 584, 587. No such showing can be made here.

Although respondent contends that the employees failed to exhaust the contractual grievance remedies, the record shows that the employees made every reasonable attempt, within the union organization and within the range of their knowledge, to attain an informal resolution of their problem.[14] Further, when Paul Allen consulted Joe Edwards, the employees' local business representative, about doing something about Local 180, Edwards suggested that the employees handle it themselves but did not suggest the filing of any grievance.[15] At a later meeting with Union Representative La Chappelle concerning the possibility of a settlement, there was no mention of the possibility of the dispute being submitted to a joint adjustment board, pursuant to Section IV (B)(10) of the AGC Agreement (R. 35; Tr. 154).

The Board does not relinquish jurisdiction over unfair labor practices merely because a party had the contractual right to go to arbitration but has never exercised the option. *Puerto Rico Telephone Co.*, 149 NLRB 950; *Aerodex, Inc.*, 149 NLRB 192; *Local Union 469, Plumbers, et al.*, 149 NLRB

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[14] Look testified that though he was given a copy of the Agreement to look at, he had not come across the grievance provision (Tr. 59, 60). Further, when questioned as to whether he had availed himself of the contract grievance procedure, Richard Allen testified that he "does not know what a grievance is" (Tr. 114).

[15] Paul Allen also testified that Victor La Chappelle, then a representative, of the California State Council of Carpenters, called it a "local matter" and referred them back to Edwards (R. 35; Tr. 146).

39; *Superior Roofing Co.,* 158 NLRB 657. In *Superior Roofing Co., supra,* involving the same AGC Agreement and contract provision that is involved in the case at hand, the Board specifically held that failure to exhaust the grievance procedure was not a bar to the Board's exercise of jurisdiction (158 NLRB at 661, n. 6).

The fact that the alleged unfair labor practice in the instant case was also asserted by respondent to involve a question of contract interpretation does not require a different result. A decision by the Board to defer a case to arbitration is largely based on the reasonable assurance that the unfair labor practice issues will be adequately treated in the private proceedings and that the rights of the individual will be properly considered. However, when the unfair labor practice in question concerns employees' Section 7 rights, the Board has usually seen fit to exercise jurisdiction. See cases cited, *supra.* Indeed, since "job discrimination strikes at the very heart of rights guaranteed employees by the Act," to defer this type of issue to arbitration would not effectuate the policies of the Act. Taking into consideration the important part hiring halls play in the hiring process of large sectors of American industry, it is important from a public interest viewpoint that "findings of unlawful hiring hall discrimination be harnessed to suitable cease and desist orders restraining such misconduct in the future." *Local Union 469, Plumbers, supra,* 149 NLRB at 46. That this is rightly the role of the Board and the subsequent judicial enforcement of its orders was suggested in *Square D Company v. N.L.R.B.,* 332 F.2d 360 (C.A. 9), where this Court dealt with the issue of whether the Board should defer to arbitration with regard to the question of whether a company under its collective bargaining agreement has to supply information requested by the union. The Court acknowledged that "if the dispute in question . . . was a controversy over the applicability or violation of a duty not only prescribed by the contract

but also imposed directly by the Act, disregard of which would constitute an unfair labor practice," — such as a provision in a contract prohibiting the employer from discriminating against an employee because of his union membership — the Board would not be compelled to defer to arbitration. The Court stated (332 F.2d at 364):

> Since Sec. 8(a) of the Act carries a similar proscription the Board itself would have full power to determine the existence of, and to prevent, such discriminatory action.

It is submitted that no different result is called for in this case of "job discrimination" by the Union, even though the Union's conduct may also be a violation of its contractual obligation to operate an "open and non-discriminatory employment list" (G.C. Exh. 2, Sec. 4(B)(1)).

The contract language itself provides further reason for rejecting respondent's defense. In the present situation, discriminatorily treated job applicants are asked to submit their case to a joint board where they are not represented. They would have to carry their case before a bi-partisan tribunal in the selection of whose members they have no voice and which contains no truly disinterested person. Only if the representatives of the Union and the employer on the joint adjustment board cannot agree is there provision for the addition of an impartial fifth representative. But even then, the fifth member is chosen by the other members of the Board and a decision, final and binding, is determined by a majority of these members. This case thus represents an even stronger showing of lack of impartiality to the aggrieved employee than did *Lummus Co. v. N.L.R.B.*, 339 F.2d 728, 732-733 (C.A. D.C.), where, in the event of a deadlock, an *impartial* arbitrator could have been appointed to make the final decision.

Respondent attempted before the Board to distinguish the *Lummus* case, *supra,* on the ground that there representatives of the local union and the employer against whom the charges were filed would constitute the appeals board, while here, since neither Local 180 nor Golden State were identified as the "union" or "employer" for purposes of the joint adjustment board provision, there was no showing that a lack of impartiality was inevitable. However, as the Board noted, a claim of discriminatory exclusive hiring hall practices "inevitably imputes misconduct to the contracting parties." Contractual grievance provisions such as these "obviously have the effect of placing the [grievant] at the mercy of agents of parties that have a community of interest and are charged, either directly or indirectly, with the misconduct" (R. 42). Contrary to respondent's assertion, there is no reason to assume that the International Union and the AGC would be more impartial or objective than the constituent local unions or employer-members they represent.

We submit that, as the question is one as to the propriety of the Board's exercise of discretion, the Board acted reasonably when it assumed jurisdiction to protect the public and individual rights affected in this present controversy, and, accordingly, that the Board's action was neither arbitrary nor capricious.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a decree should issue, enforcing the Board's order in full.

Respectfully submitted,

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HERBERT FISHGOLD,
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January 1968

National Labor Relations Board

CERTIFICATE OF SERVICE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows'

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * *

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents —

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

APPENDIX B

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GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
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2	11	11	12
3	15	14	15
4	20	20	20
5	80	82	82
6	88	87	88

No. 22297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH WILMOT, Counsel for the General Counsel of the National Labor Relations Board,

Appellant,

v.

DAVID DOYLE, National Labor Relations Board Trial Examiner on relation of LOCAL 959 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT, and GROCERS WHOLESALE, INC.,

Appellees,

and

RALPH WILMOT, in his individual capacity,

Intervenor.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

BRIEF FOR THE APPELLANT

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RALPH WILMOT, Counsel for the General Counsel of the National Labor Relations Board,

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Appellees.

and

RALPH WILMOT, in his individual capacity,

Intervenor.

STATEMENT OF JURISDICTION

This is an appeal from an order (R. 67)[1/] of the United States District Court for the District of Alaska granting appellees' petition for enforcement of a subpena duces tecum issued by the National Labor Relations Board and directed to Ralph Wilmot, as counsel for the General Counsel

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1/ References to those portions of the record printed in Volume I of the Transcript of Record are designated "R." Refererences to the transcript of the hearing before the District Court are designated "Tr."

of the National Labor Relations Board. Appeal is also taken from the District Court's subsequent order (R. 71-72) adjudging Wilmot to be in civil contempt for failing to comply with the order enforcing subpena. The jurisdiction of the District Court was invoked under Section 11(2) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), 28 U.S.C. 1337, and 28 U.S.C. 1361.[2/] The jurisdiction of this Court is invoked under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE

A. Proceedings before the Board

On April 17, 1967, on the basis of charges filed by several individuals, the Regional Director for the Board's Nineteenth Region in Seattle, Washington, issued a complaint against the Union and the Company, the appellees herein, alleging that they had engaged in a number of unfair labor practices under the Act. Prior to the commencement of the hearing thereon, the Union secured from the Board and served upon Ralph Wilmot, the field attorney trying the case on behalf of the Board's General Counsel, a subpena duces tecum.[3/] The subpena required Wilmot to produce: (1) the original

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2/ The relevant portions of the Act and the Board's rules are set forth in an appendix, infra, pp.20-27.

3/ Section 11(1) of the Act requires that the Board, upon the application of any party in an unfair labor practice case, issue subpenas requiring the attendance of witnesses and production of evidence at the hearing. The person subpenaed is then entitled to petition the Board to revoke the subpena, and the Board must revoke it if it finds that the evidence sought is irrelevant, the material subpenaed is not described with sufficient particularity, "or if for any other reason sufficient in law the subpena is otherwise invalid" (29 C.F.R. Sec. 102-31(b).

copies of settlement agreements which counsel for the Company, the Union and some of the charging parties had signed during settlement negotiations which Wilmot and the other parties had conducted on June 21; and (2) a statement based on Wilmot's own files, or the Regional Office files, of the number of telephone calls between Wilmot and the Regional Office on June 21, identifying the persons with whom he had spoken (R. 7).

Wilmot filed a timely petition to revoke the subpena on the ground that the settlement agreement was irrelevant to the proceeding because it had not been approved in writing by the Regional Director, as required by the Board's rules, and so had not become effective (R. 8-9). Attached to the petition was an affidavit by Wilmot stating that under Section 102.118 of the Board's rules (29 C.F.R. Sec. 102.118), [4/] the material subpenaed was under the control of the General Counsel and could be disclosed only when permitted by him, and that the requisite permission had not been granted (R. 10). Counsel for the Union, Richard Donaldson, filed an affidavit in opposition to the petition, asserting that the Union needed the material subpenaed in order to prove that a valid settlement agreement was orally agreed upon during negotiations on June 21 (R. 11-16).

When the unfair labor practice hearing began on October 4, the Trial Examiner presiding, David Doyle, denied Wilmot's petition to revoke the subpena. He ruled that the Union had a right to see the original copies of the settlement agreements "to make sure that they have not been approved in writing" (R. 49), and that the Union had a right to compel Wilmot to testify regarding the latter's telephone calls to the Regional Office on the date of

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4/ The test of this section is set out infra, p. 24-25.

the settlement negotiations to establish that the agreement had been approved orally by the Regional Director (R. 50).

Upon the demand of counsel for the Company and the Union, the Trial Examiner then directed Wilmot to produce the material subpenaed (R. 56-57). Wilmot refused, stating that under Section 102.118 of the Board's rules, he was prohibited from doing so (R. 57). Counsel for the Union then moved that the Trial Examiner dismiss the complaint (R. 58). Wilmot opposed the motion, and asked that he be given an opportunity to seek special permission from the Board to appeal the Examiner's ruling, as provided in Section 102.26 of the Board's rules (R. 59).[5/] The Trial Examiner denied the respondents' motion to dismiss the complaint on the ground that dismissal could "cut off" the charging parties "from any rights they may have," but stated that he would grant an adjournment so that respondents could institute a subpena enforcement

5/ 29 C.F.R. Sec. 102.26. This section states, in relevant part: "Unless expressly authorized by the Rules and Regulations, rulings . . . by the trial examiner on motions . . . on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record. . . . Requests to the Board for special permission to appeal from such rulings of the . . . trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party."

to grant an adjournment to allow Wilmot to take an appeal to the Board because, he said, the Board's rules contemplate immediate recourse to the courts in the event of noncompliance with a Board subpena, and to give counsel for the General Counsel an opportunity to appeal the Examiner's ruling to the Board would be to treat him as a "favored litigant" -- something which the Trial Examiner obviously did not want to do (R. 61).

Counsel for the Union was then asked how much time he wanted to bring a subpena enforcement proceeding in the District Court (R. 62). Mr. Donaldson stated that he would go to the court that afternoon. The Trial Examiner advised him to wait until the next day, however, pointing out that the reporter would need time to prepare the transcript of the hearing that had just been held, and that the transcript of the hearing should be before the District Judge so that the latter could get "the full portence and flavor" of the Examiner's rulings (R. 63). The hearing was then recessed until 2 p.m. the next day (R. 64).

6/ Earlier in the hearing (R. 53), the Trial Examiner quoted in full Section 102.31(d) of the Board's rules, as follows: "On the failure of any person to comply with a subpena issued upon the request of a private party the general counsel shall, in the name of the Board, but on relation of such private party institute proceedings in the appropriate district court for the enforcement thereof unless in the judgment of the Board the enforcement of such subpena will be inconsistent with law and the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to assume responsibility for the effective prosecution of the same before the court." The Trial Examiner then said that he "supposed" that the General Counsel would not institute a subpena enforcement proceeding against his own agent, and expressed the thought that a petition to en-

B. Proceedings in the District Court

On Thursday, October 5, the Company and the Union filed a petition for enforcement of the subpena duces tecum in the District Court, naming Trial Examiner Doyle as the petitioner on their behalf (R. 3-4). Wilmot filed a motion for a continuance on the ground that he was "taking the necessary steps" under Section 102.26 of the Board's rules to appeal the Trial Examiner's order denying his petition to revoke the subpena (R. 1-2). When the hearing convened before Judge von der Heydt that afternoon, counsel for the Union spoke in opposition to the motion for the continuance on the ground that further delay in the unfair labor practice hearing would be costly and inconvenient to the parties (Tr. 5-7). The Court thereupon denied the motion for a continuance, without opinion, and directed that the hearing proceed (Tr. 8).

During the course of the hearing, the sole defense raised by Wilmot was that the petition should be denied on the ground that Section 11(2) of the National Labor Relations Act provides that district courts have jurisdiction to enforce Board subpenas only upon application of the Board, or the General Counsel acting on its behalf (Tr. 13-15).[7/] Since the Board was not the petitioner here, Wilmot pointed out, the complaint should be dismissed.

7/ Section 11(2) states, in relevant part: "In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an

(Cont.)

The Court announced its ruling the next morning (Tr. 20-21). It enforced the subpena and said, with respect to Wilmot's defense, that it did not believe that Congress intended that the General Counsel could bar a private party from compelling the production of evidence he (the private litigant) believes to be necessary. The Court then adjourned.

The unfair labor practice hearing reconvened a half hour later, and Wilmot was again called as a witness and asked to comply with the subpena (R. 70-71). Wilmot refused, however, again stating that he was acting under explicit instructions of the General Counsel (R. 71; Tr. 22). The hearing was thereupon adjourned, and counsel for the Company and the Union secured an order from the District Court directing Wilmot to appear that afternoon and show cause why he should not be held in contempt (R. 68).

At the hearing on the order to show cause, Wilmot was represented by another Board attorney from the Seattle Regional Office, Gordon Byrholdt (Tr. 22). They told the Court that Wilmot's refusal to comply with the Court's order was based on instructions from his superiors (Tr. 22, 28). Byrholdt and counsel for the Company, Donald Burr, explained that they believed the order enforcing the subpena was not appealable, and that in order to get an appealable issue, it was necessary for Wilmot to be adjudicated in contempt of court (Tr. 27-28). Byrholdt stated, "Had we been able to appeal the order this morning, an appeal would have been noted for that time. I fully appreciate that the order was, as Mr. Burr states, interlocutory"

7/(Cont.)

order requiring such person to appear before the Board. . . ." In Section 102.31(d) of its rules, the Board conferred upon the General Counsel the authority to institute subpena enforcement proceedings "in the name of the Board. . . "

(Tr. 28).[8/] Byrholdt asked that whatever order the Court might enter against Wilmot be stayed so that review thereof could be obtained in the Court of Appeals (Tr. 22-23, 26).

The Court thereupon found Wilmot to be in contempt of court and ordered that he be fined $300 per day, payable to the Company and the Union, for each day that he refuses to comply with the order of the Court (R. 71-72; Tr. 29-30). The order, however, was stayed on condition that Wilmot file a notice of appeal by Monday, October 9 (Tr. 29-30). On October 9, notices of appeal were filed from both the order adjudging Wilmot in civil contempt (R. 76) and the order enforcing the subpena (R. 74).

C. Events subsequent to filing of the notices of appeal

On October 27, the Board granted Wilmot's request for special permission to appeal the Trial Examiner's denial of his petition to revoke the subpena. Certified copies of the Board's order have been lodged with the

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8/ The belief of the parties, and apparently of the court below, that the order enforcing the subpena was not a final order and hence not appealable, is erroneous. See Chapman v. Goodman, 219 F. 2d 802, 806 (C.A. 9); Bouscher v. United States, 316 F. 2d 451, 454-456 (C.A. 8); O'Connor v. O'Connell, 253 F. 2d 365 (C.A. 1); Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 226-227 (C.A. 2), aff'd 317 U.S. 501. See also Rule 81(a)(3), F.R.Civ. P. District court orders enforcing Board subpenas have always been directly appealed to the courts of appeals without the necessity of having the person subpenaed incur a contempt citation. See, e.g., Hamilton v. N.L.R.B., 177 F. 2d 676, 677 (C.A. 9); Goodyear Tire & Rubber Co. v. N.L.R.B., 122 F. 2d 450 (C.A. 6); N.L.R.B. v. Friedman, 352 F. 2d 545, 547 (C.A. 3); Link v. N.L.R.B., 330 F. 2d 437 (C.A. 4).

Clerk of the Court

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in ruling that it had jurisdiction to enforce a subpena issued by the National Labor Relations Board, upon the petition of a private party.

2. The Board's General Counsel was an indispensable party to the proceeding, and the District Court erred in directing a subordinate of the General Counsel to produce documents from Board files which the General Counsel, not the subordinate, controls.

ARGUMENT

I. THE ORDERS APPEALED FROM SHOULD BE VACATED AS MOOT, AND THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO DISMISS THE PETITION

The District Court concluded that it had jurisdiction to grant appellees' petition for enforcement of a subpena duces tecum issued by the Board and directed to Board Field Attorney Ralph Wilmot. It ordered Wilmot to comply with the subpena and, upon his refusal to do so, adjudged him to be in civil contempt of the Court.

The Board's reversal of the Trial Examiner and revocation of the subpena has mooted any question as to the propriety of the District Court's order of enforcement. The subpena no longer exists. The order enforcing the subpena should therefore be vacated and the case remanded with instructions to dismiss the petition as moot. Oil Workers v. Missouri, 361 U.S. 363; United States v Munsingwear, 340 U.S. 36, 39-40; Local 134, IBEW v. Madden, F. 2d (C.A. 7), 66 LRRM 2046; Graziadei v. United States, 319 F. 2d 913 (C.A. 7); Star Market Co. v. Alpert, 56 LRRM 2638 (C.A. 1);

t. Louis-San Francisco Ry. Co. v. Railroad Yardmasters of America, 347 F. d 983 (C.A. 5); Dulles v. Nathan, 225 F. 2d 29 (C.A.D.C.); Acheson v. Droesse, 97 F. 2d 574 (C.A.D.C.).

By the same token, the order adjudging Wilmot to be in civil contempt f court should also be vacated now that the underlying case is moot. Unlike riminal contempt, which is imposed as punishment for an affront to the dignity f the court, civil contempt is imposed merely to compel action by the re- ondent and is purely remedial in nature. United States v. United Mine Workers, 30 U.S. 258, 294-295. It is settled law that when the order underlying a ivil contempt proceeding has been reversed and vacated on appeal, the contempt djudication must also be vacated since there is no longer any order out- tanding with which the respondent can comply. United States v. United Mine orkers, supra, at 295; Western Fruit Growers, Inc. v. Gotfried, 136 F. 2d 98, 00 (C.A. 9). Hyde Construction Co. v. Koehring Co., 348 F. 2d 643, 647-648 C.A. 3), reversed on other grounds, 382 U.S. 362; In re Door, 195 F. 2d 766, 69 (C.A.D.C.). So here, if the order enforcing the subpena is vacated because f mootness, the Company and the Union are no longer entitled to remedial elief because there is no district court order with which Wilmot can comply. or this reason alone, the order adjudging Wilmot to be in civil contempt of ourt should be vacated and set aside.

In any event, even assuming that mootness of the underlying case s insufficient to warrant vacating Wilmot's contempt adjudication, we submit hat the order adjudging him in civil contempt should be reversed because, s we show below, the court below erred in issuing the order enforcing the bpena. In re Green, 369 U.S. 689, 692; United States v. Thompson, 319 F. 2 665, 667-668 (C.A. 2); Heasly v. United States, 312 F. 2d 641, 648-649

(C.A. 8); Western Fruit Growers, Inc. v. Gotfried, supra.

II. THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION

A. Section 11(2) of the Act authorizes district court enforcement of Board subpenas only upon application of the Board

Section 11(1) of the Act provides that the Board, at the request of any party to proceedings before it, shall issue a subpena requiring the attendance and testimony of witnesses or the production of evidence Section 11(2) further provides that the appropriate United States District Court shall have jurisdiction to issue orders enforcing such subpenas "upon application by the Board." This limited grant of jurisdiction makes clear that the Act contemplates district court enforcement of Board subpenas only upon suit by the Board, and not upon application of private litigants such as the appellees in this case. 9/ The courts have consistently recognized this distinction. Biazevich v. Becker, 161 F. Supp. 261 (S.D. Cal.); N.L.R.B. v. Erkkila, 42 LRRM 2594 (U.S. Dist. Ct., N.D. Cal.); Intertype Corp., Div. of Harris-Intertype Corp. v. Penello, 269 F. Supp. 573, 580-581 (W.D. Va.); Ex-Cell-O Corp. v. Little, 268 F. Supp. 755, 758 (S.D. Ind.); Evans Products Co. v.

9/ The fact that the Union and the Company filed their petition in the name of the Trial Examiner does not alter the status of the proceeding they initiated. Section 102.35 of the Board's rules (29 C.F.R. 102.35), specifically setting forth the powers which the Board has delegated to its Trial Examiners, does not authorize the institution of suits in the district courts on relation of private parties. Nor can Section 102.31(d) (Cont.).

Reynolds, 61 LRRM 2422 (U.S. Dist. Ct., W.D. Tenn.). See also Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205, 209 (C.A. 7), cert. denied, 364 U.S. 910. If the Board refuses to institute a subpena enforcement proceeding on relation of a private party, then that subpena cannot be enforced.[10/]

This is not to say that a private party is without recourse to the courts from a refusal by the Board to seek enforcement of a subpena on his behalf in an unfair labor practice proceeding. In such a case, if the Board should ultimately issue a final order which aggrieves that party, he may obtain judicial review of the entire unfair labor practice proceeding -- including the Board's action on his subpena -- in the appropriate court of appeals under Section 10(e) or (f) of the Act. If the court should find that

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9/ (Cont.)
of the Board's rules (29 C.F.R. 102.31(d)) be "liberally construed" (R. 19) to permit such action. That section specifically states that ". . . the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court" (emphasis added).

10/ The assumption by the Trial Examiner and the court below that the General Counsel, on his own, would refuse to enforce the subpena herein at appellees' request is unjustified. Section 102.31(d) provides that the General Counsel "shall" institute ex rel. proceedings "unless in the judgment of the Board /not the General Counsel/ the enforcement of such subpena would be inconsistent with law and the policies of the Act." No request was ever made by appellees to the General Counsel or the Board to institute an ex rel. proceeding in this case.

the Board committed prejudicial error, the court would deny enforcement of its order and, if appropriate, remand the case to the Board to correct the error made.

Thus, here, the Company and the Union contend that a valid settlement agreement had been entered into with the General Counsel prior to the hearing. When the General Counsel declined to produce the documents which allegedly supported their claim, the Union moved to dismiss the complaint. The Trial Examiner denied the motion. If the Board subsequently affirms the Trial Examiner on this point, finds that the Company and the Union committed the unfair labor practices alleged and issues a final order against them, the propriety of both the General Counsel's refusal to produce the evidence sought and the Trial Examiner's refusal to dismiss the complaint can be reviewed by an appropriate court of appeals before the Board order can be effective. See, e.g., General Engineering, Inc. v. N.L.R.B., 341 F. 2d 367 (C.A. 9); N.L.R.B. v. Seine and Line Fisherman's Union of San Pedro, 374 F. 2d 974 (C.A. 9), cert. denied 66 LRRM 2370.[11/] Accordingly, the fact that appellees could not on their

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11/ In General Engineering, the Board affirmed the Trial Examiner's refusal to revoke a subpena duces tecum which had been served on one of the Board's Regional Directors. On petition to review an order which was subsequently entered against the party requesting the subpena, this Court concluded that the requested documents were not privileged and that the Board erred in revoking the subpena. In remanding the case for further proceedings, the Court observed that while the Board could decline to produce evidence for any reason it chose, it "could not enter an enforceable order if it insists on withholding evidence which, under the rules

(Cont.)

own, secure enforcement of their Board subpena in the District Court does not warrant the conclusion that they would be helpless if the Board refused to seek enforcement thereof.

B. 28 U.S.C. 1337 does not confer jurisdiction upon the District Court in this case

The contention made by appellees in the court below that 28 U.S.C. 1337 provides an alternate basis for the District Court's assertion of jurisdiction over this action is without merit.[12/] That section grants the district courts ". . . original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce. . . . " It is well settled, however, that the jurisdiction thus conferred is not unlimited. See, e.g., Boire v. Greyhound Corp., 376 U.S. 473; Teamsters, etc., Local 690 v. N.L.R.B.,

11/(Cont.) of evidence in Federal District Courts, is admissable" (341 F. 2d at 376). In N.L.R.B. v. Seine and Line Fisherman's Union, this Court also found that the Trial Examiner had erred in revoking subpenas duces tecum and ad testificandum directed to Board employees, but concluded that the parties requesting the subpenas had failed to prove that they had been prejudiced by the error; accordingly, the Board's order against them was enforced. For other cases involving appellate review of Board action with regard to subpenas directed to its employees, see Singer Sewing Machine Co. v. N.L.R.B., 329 F. 2d 200 (C.A. 4); Harvey Aluminum v. N.L.R.B., 335 F 2d 749 (C.A. 9) and N.L.R.B. v. Capitol Fish Company, 294 F. 2d 868 (C.A. 5).

12/ The court below did not specify which of the three bases for jurisdiction advanced by the Company and the Union it relief upon in issuing its order

375 F. 2d 966, 968-969 (C.A. 9); Urethane Corp. v. Kennedy, 332 F. 2d 564 (C.A. 9); Department & Specialty Store Employees v. Brown, 284 F. 2d 619 (C.A. 9), cert. denied, 366 U.S. 934. Since, by the terms of a specific law, only the Board is empowered to petition the courts for enforcement of its subpenas, the general grant of jurisdiction established by Section 1337 cannot be relied upon to accomplish the same result at the request of a private party. The limitations and qualifications on subpena enforcement proceedings which Congress imposed when it enacted Section 11(2) of the Act cannot be ignored, as appellees would have the court do, by relying on an unrelated statute. Cf. California Ass'n of Employers v. Bldg. & Const. Trades Council, 178 F. 2d 175, 177 (C.A. 9); Schatte v. I.A.T.S.E., 182 F. 2d 158, 165-166 (C.A. 9), cert. denied, 351 U.S. 950; Friendly Society of Engravers and Sketchmakers v. Calico Engraving Co., 238 F. 2d 521 (C.A. 4); Amazon Cotton Mill Co. v. Textile Workers of America, 167 F. 2d 183, 188 (C.A. 4). See also, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52; United Aircraft Corp. v. McCulloch, 365 F. 2d 960, 961 (C.A.D.C.); Bokat v. Tidewater Equipment Co., 363 F. 2d 667, 671-672 (C.A. 5). Nothing in Section 1337 permits a litigant before the Board to circumvent the procedure Congress has provided in Section 11(2) of the Act by resorting to an independent equity suit in the district court.

C. 28 U.S.C. 1361 is also inapplicable to this case

28 U.S.C. 1361, which invests the district courts with original jurisdiction of actions "in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff," is not a proper basis for jurisdiction over this action, since "mandamus may

not ordinarily be resorted to as a mode of review when a statutory method has been provided." Bartsch v. Clarke, 293 F. 2d 283, 285 (C.A. 4). Accord: Whittier v. Emmet, 281 F. 2d 24, 28-29 (C.A.D.C.); Algonquin Gas Transmission Co. v. F.P.C., 201 F. 2d 334, 337-338 (C.A.D.C.). As shown above, the actions of the General Counsel and the Trial Examiner in this case are subject to adequate review under Section 10(e) and (f) of the Act. Mandamus is thus unavailable. Cf. Indiana & Michigan Electric Co. v. F.P.C., 224 F. Supp. 166, 169-170 (N.D. Ind.). In any event, mandamus lies only to compel the performance of ministerial duties, plainly defined by law, rather than those committed to the discretion of a government official. Rural Electrification Administration v. Northern States Power Co., 373 F. 2d 694-695, n. 14 (C.A. 8). The General Counsel's disposition of documents within his control is clearly a matter committed to his discretion, and is reviewable only insofar as the abuse of that discretion may bear upon the enforceability of a final Board order.

III. THE GENERAL COUNSEL WAS AN INDISPENSABLE PARTY TO THE ACTION

By their action against Ralph Wilmot, a Board field attorney, the Company and the Union sought to compel the production of documents from the files of one of the Board's regional offices. Section 3(d) of the Act, however, vests the ultimate authority over the operation of the regional offices in the General Counsel.[13/] The role of the regional office personnel in the maintenanance of files there is entirely ministerial, since Section 102.118 of the Board's Rules and Regulations (29 C.F.R. 102.118) requires

13/ Section 3(d) is set forth, infra, p. 20.

that the General Counsel consent in writing to the production of such documents or the testimony of Board employees in proceedings relating to them. In this case, appellees filed their action in the District Court after the General Counsel had denied their request for his consent. Field Attorney Wilmot stated repeatedly at the hearing before the District Court that he was bound by the explicit instructions of the General Counsel and had no authority to testify or produce the requested documents.

In these circumstances, the General Counsel was an indispensable party to the action, and the District Court erred in not dismissing the petition for that reason. As the Supreme Court has stated, "The superior officer is an indispensable party if the decree sought will require him to take action either by exercising a power lodged in him by law or by having a subordinate exercise it for him." Williams v. Fanning, 332 U.S. 490, 493. See also Vapor Blast Independent Shop Worker's Ass'n v. Simon, 305 F. 2d 717, 719 (C.A. 7); Dombrovskis v. Esperdy, 321 F. 2d 463, 465-466 (C.A. 2); Harris v. Smedile, 302 F. 2d 661 (C.A. 7).[14/]

14/ Cf. United States ex rel. Touhy v. Ragen, 340 U.S. 462. In that case, the Supreme Court held that the Attorney General of the United States could validly prescribe regulations requiring his consent to the production of official documents or other records by his subordinates. In so holding, the court affirmed the Seventh Circuit's finding (United States ex rel. Touhy v. Ragen, 180 F. 2d 321, 323-324), that the United States District Courts had no jurisdiction or power to hold a Justice Department employee in contempt for withholding documents pursuant to the regulations.

CONCLUSION

In sum, the court below had no jurisdiction to entertain the subpena enforcement petition because it was not filed by the Board, and the District Court improperly sought to compel Wilmot to produce the information sought when it was the General Counsel, not he, who had final authority over the Regional Office files. The adjudication of Wilmot in civil contempt must accordingly fall. A decree should issue reversing the judgment below, vacating the orders of the District Court, and remanding the case with instructions to dismiss the petition.

In any event, it is apparent from the record that Wilmot disobeyed the order enforcing the subpena only because he, all the other counsel and the District Judge, were under the mistaken impression that the only way to get an appealable order was for him to be adjudged in contempt of court. Under these circumstances, we request that this Court, in the exercise of its discretion, vacate the order adjudging Wilmot in contempt of court even if the Court should find that the order enforcing the subpena was properly entered.

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DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
WILLIAM H. CARDER,
Attorneys,

National Labor Relations Board.

February 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

/Section 3/ (d) * * * the General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or may be provided by law. * * *

* * * *

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be

served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set

aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 --

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days

after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

APPENDIX B

The relevant provisions of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended (29 C.F.R. 102.1, et seq.), are as follows:

Sec. 102.118 Same; Board employees prohibited from producing files records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto. -- No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, subpoena duces tecum, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke,

motion to quash, or otherwise, to have such subpena invalidated on the ground that the evidence sought is privileged against disclosure by this rule: Provided, That after a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken: Provided further, That after any witness has testified in any postelection hearing pursuant to section 102.69(d), any party may move for the production of any statement of such witness in possession of any agent of the Board, if such statement has been reduced to writing and signed or otherwise approved by the witness. Such motion shall be granted by the hearing officer.

Sec. 102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal. -- All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the

statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

Sec. 102.31(d) Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpena would be inconsistent with law and with the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

No. 22297

United States Court of Appeals

For the Ninth Circuit

RALPH WILMOT, Counsel for the General Counsel for the National Labor Relations Board,

Appellant,

vs.

DAVID DOYLE, National Labor Relations Board Trial Examiner on relation of Local No. 959 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Independent Grocers Wholesale, Inc.,

Appellee,

RALPH WILMOT, in his individual capacity,

Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AT ANCHORAGE

HONORABLE JAMES A. VON DER HEYDT
DISTRICT JUDGE

BRIEF OF INTERVENOR

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BRIEF OF INTERVENOR

STATEMENT RELATING TO JURISDICTION

Intervenor denies that the District Court had jurisdiction.

The jurisdiction of this court derives from Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Ralph Wilmot, as counsel for the General Counsel of the National Labor Relations Board, has appealed from the Order for Enforcement of Supoena Duces Tecum entered by the District Court on October 6, 1967 (R. 66, 67, 74, 75) and from the Order of the District Court finding him to be in contempt of court, orally announced on October 6, 1967 (R. 70), and formally entered October 9, 1967 (R. 71-72, 76), and, in his capacity as counsel for the General Counsel of the National Labor Relations Board, he is represented by counsel for that agency.

Because the order finding him in contempt of court (R. 71-72) runs against him personally and imposes a fine on him as an individual, and might jeopardize his standing at the bar, this court has accorded Mr. Wilmot the right to intervene in his individual capacity.

Mr. Wilmot is a lawyer, a member of the bar of the State of Washington, and at all times hereinafter mentioned was, and at present is, employed as a field attorney by the General Counsel of the National Labor Relations Board, assigned to the office of Region 19.

On April 17, 1967, the Regional Director of Region 19 issued a complaint in three unfair labor practice cases against Teamsters Local 959 and in one such case against Grocers Wholesale, Inc., an employer. These cases were consolidated and set for trial in Anchorage,

Alaska, on June 20, 1967 (R. 11).

Before the trial opened, counsel for the parties advised the trial examiner that settlement negotiations were pending and counsel succeeded in reaching a settlement agreement on June 21. By telephone Mr. Wilmot obtained oral approval of the settlement by the Regional Attorney in Seattle, the Regional Director, being temporarily absent. Accordingly the trial examiner left Anchorage without convening the hearing (R. 12).

On July 5, 1967, the Regional Director advised all parties that he would not approve the settlement agreement and would reschedule the hearing of the consolidated cases (R. 12).

The hearing was rescheduled for September 12, 1967. On September 6, 1967, while Mr. Wilmot was on vacation, Respondent Union served the subpoena duces tecum directed to Mr. Wilmot on whose behalf the Regional Director accepted service. The hearing was postponed to October 4, 1967 (R. 30).

On September 28, 1967, counsel for Respondent Union, Mr. Richard P. Donaldson, talked with Mr. Wilmot on the telephone about the subpoena, and it was agreed that Mr. Donaldson would not be required to serve a new subpoena (R. 30).

Under date of September 28, 1967, pursuant to section 102.118 of the Board's Rules and Regulations (29

CFR § 102.118), Mr. Donaldson addressed a letter to Arnold Ordman, General Counsel, requesting that he permit Mr. Wilmot to appear and testify in response to the subpoena and to produce the documents requested. The pertinent portions of the rule provide:

> "No . . . attorney . . . or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending . . . before the Board . . . with respect to any information, facts, or other matter coming to his knowledge in his official capacity . . . whether in answer to a . . . subpena duces tecum, or otherwise, without the written consent of . . . the general counsel if the official or document is subject to the supervision or control of the general counsel."

On September 29, 1967, Mr. Wilmot took the steps which section 102.118 imposes on him in the following language:

> "Whenever any . . . subpena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons . . . he will, unless otherwise expressly directed by the . . . general counsel . . . , move . . . to revoke . . . such subpena . . . on the ground that the evidence sought is privileged against disclosure by this rule: . . ."

Mr. Wilmot petitioned for revocation of the subpoena duces tecum (R. 30-31). His petiton was received by the trial examiner in San Francisco on October 2, 1967 (R. 3).

By telegram received by Mr. Donaldson on October 3, 1967, Mr. Ordman denied Mr. Donaldson's request that Mr. Wilmot be permitted to testify and produce the requested documents (R. 16). The Regional Attorney in Seattle telephoned Mr. Wilmot in Anchorage and acquainted him with the contents of the telegram from Mr. Ordman to Mr. Donaldson, a copy of which had been sent to the regional office (R. 31-32).

On the morning of October 4, 1967, trial examiner David Doyle convened the hearing at 10:00 a.m. and proceeded to conduct a pre-trial conference on the record, in which Mr. Wilmot's motion to revoke the subpoena duces tecum was considered and denied (R. 25-51).

Thereupon Mr. Wilmot asked for time to request leave to take an appeal directly to the Board from the trial examiner's ruling (R. 53), as he could do with special permission of the Board pursuant to section 102.26 of the Rules and Regulations (29 CFR § 102.26).

The trial examiner said with respect to a direct appeal to the Board:

> ". . . it would seem to me that this is not a matter upon which the general counsel should have a right of interim appeal, . . ." R. 54.

Accordingly, the trial examiner had Mr. Donaldson call Mr. Wilmot as a witness and request production

of the documents named in the subpoena. Mr. Wilmot declined to produce them. The trial examiner directed Mr. Wilmot to comply with the subpoena duces tecum and Mr. Wilmot declined to do so on the ground that he lacked the permission required by section 102.118 of the Rules and Regulations (R. 56-58).

Respondents Union and Employer moved that the case be dismissed (R. 34-36), basing their motions on section 102.35(8) of the Board's Rules and Regulations and on analogy to remedies for refusal to make discovery under the Federal Rules of Civil Procedure (R. 59).

The trial examiner denied the motions to dismiss and granted an adjournment to allow the Respondents Union and Employer to seek enforcement of the subpoena duces tecum in the District Court (R. 60-62).

On October 5, 1967, the Respondents Union and Employer served on Mr. Wilmot a petition for enforcement of subpoena duces tecum, addressed to the District Court, and brought by the trial examiner on relation of the two respondents (R. 3-4).

Mr. Wilmot moved for a continuance to allow him to seek permission to appeal directly to the Board, in which motion he recited that the necessary steps to obtain permission for such an appeal were under way (R. 1-2).

The petition and the motion came on for hearing at

4:10 p.m. on October 5. The court heard argument on both and denied the motion for continuance and reserved ruling on the petition for enforcement until 10:30 a.m. on October 6 (R. 65), ordering that, in the meantime, no individual "involved" in the hearing before the Board was to leave the jurisdiction of the court (Tr. 19).

At 10:30 a.m. on October 6, the court announced its decision granting the petition for enforcement of subpoena duces tecum and ordered the unfair labor practice proceeding to reconvene at 11:00 a.m. (Tr. 20-21). This rapid sequence of events left Mr. Wilmot no time at all to communicate to his superiors the order of the court and ask for instructions in the light of it.

The trial examiner reconvened the hearing at 11:00 a.m. as the court had ordered. Mr. Wilmot was called as a witness and refused to testify or otherwise respond to the subpoena (R. 69).

Mr. Wilmot was then ordered to appear at 3:30 p.m. on that same day, October 6, to show cause why he should not be held in contempt of court (R. 68).

The court convened at 3:40 p.m. and the court held Mr. Wilmot in contempt of court, fined him three hundred dollars, stayed the fine until 3:00 p.m. Monday, October 9, 1967, to allow him time to appeal, and ordered that, if no appeal had been taken by that

time, the fine would have to be paid, each day of violation being considered a separate violation. In addition, the court forbade him to leave the jurisdiction until released by the court (Tr. 29-30, R. 70-72). Appeals were timely taken from both the order directing Mr. Wilmot to comply with the subpoena duces tecum (R. 74) and the order adjudging him in civil contempt (R. 76), and Mr. Wilmot was permitted to leave Alaska.

No further proceedings were held in the unfair labor practice cases.

SPECIFICATION OF ERRORS

1. The District Court erred in taking jurisdiction of the petition to enforce subpoena duces tecum and of the entire proceeding.

2. The District Court erred in granting the petition to enforce subpoena duces tecum (R. 66, Tr. 20-21).

3. The District Court erred in finding the intervenor to be guilty of civil contempt (R. 70-72, Tr. 29-30).

SUMMARY OF ARGUMENT

The District Court had no jurisdiction at all to enforce the subpoena on the petition of the trial examiner or private parties.

Jurisdiction of the District Court to enter the orders from which appeal has been taken must be found in section 11(1) and (2) of the National Labor Relations

Act, Title 29 U.S.C. § 161, or it does not exist at all. The statute confers no such jurisdiction. Federal district courts being courts of limited jurisdiction, there is no jurisdiction unless clearly conferred by Congress. Congress in the area here material having limited the jurisdiction of the district court to enforce a subpoena solely to jurisdiction to enforce it on petition of the Board, no jurisdiction exists on application of the trial examiner or private parties.

The National Labor Relations Board may withhold or exclude any evidence it chooses to withhold or exclude from its own proceedings at the risk of entering an unenforceable order. No court can order the Board to produce or admit particular evidence. If the Board improperly withholds or excludes evidence, the parties have an entirely adequate remedy in the statutory procedure for review of Board orders.

The subpoena duces tecum was not enforceable in any event because the documents it sought were documents the production of which cannot be compelled by subpoena duces tecum.

ARGUMENT

I

THE DISTRICT COURT NEVER ACQUIRED JURISDICTION OF THE PROCEEDINGS IT BEING A COURT OF LIMITED JURISDICTION, CONGRESS HAVING CONFERRED POWER TO ENFORCE SUBPOENAS ONLY ON PETITION OF THE BOARD ITSELF AND NOT OF ANY OTHER PERSONS

The point which Mr. Wilmot urged unsuccessfully

before the court on October 5, 1967, that the court lacked jurisdiction to grant the petition for enforcement of the subpoena duces tecum was well taken.

It has been held countless times that United States District Courts are courts of limited jurisdiction and have only such powers as Congress bestows on them. In *Kline v. Burke Construction Co.*, 260 U.S. 226 at 234, 43 S.Ct. 79, 67 L.Ed. 226, the Supreme Court said:

> ". . . Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10; *United States v. Hudson & Goodwin*, 7 Cranch, 32; *Sheldon v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U.S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . ."

The jurisdiction of the district court must be found, if at all, in section 11(1) and (2) of the National Labor Relations Act, 29 U.S.C.A. § 161(1) (2), which reads, insofar as pertinent, as follows:

> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon appli-

cation of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, *and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings*, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. . . .

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, *upon application by the Board* shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (Emphasis supplied).

Unless the jurisdiction of the district court is found within these provisions of the National Labor Relations Act itself, it does not exist, since the provisions quoted from the National Labor Relations Act are part of the

system provided by Congress for the enforcement of that particular statute. We are concerned in this case with the enforcement procedures of the agency itself and, if subpoenas issued in the name of the Board are not enforceable within the statutory scheme for enforcing the Act, they certainly are not enforceable under any general legislation.

Under the statute the District Court has jurisdiction to enforce subpoenas on petition of the Board only and not otherwise. In the instant case neither the Board nor the General Counsel petitioned the court for enforcement. Accordingly, the District Court acquired no jurisdiction to enforce it.

Two cases indicate the correct disposition of this appeal.

In *Biazevich v. Becker* (D.C.,S.D.Cal.,C.D., 1958) 161 F.Supp. 261, the District Court did what the District Court should have done in the instant case and dismissed the complaint of a private party for enforcement of a subpoena duces tecum directed to regional officials which the trial examiner refused to quash. In that case after the officials took the stand and declined to testify the parties seeking to adduce their testimony, unlike their counterparts in the instant case, did, at least, request the General Counsel of the Board to initiate enforcement proceedings in the District Court. The General Counsel denied their request to initiate

enforcement proceedings. The parties seeking to adduce the testimony then sought enforcement in the District Court. The District Court held, as the District Court should have held in the instant case:

> "The complaint does not state a claim over which this Court has jurisdiction. The federal district courts are without jurisdiction to intervene during the course of an unfair labor practice proceeding before a trial examiner of the National Labor Relations Board, for the purpose of deciding questions raised in that proceeding. The exclusive procedure for judicial review of such questions is provided by the National Labor Relations Act itself. Sections 10(e) and (f) of the Act provide for full review by the Courts of Appeals, following a final Board decision, of all questions which may be presented during an unfair labor practice case, and plaintiffs herein are required by the Act to follow that procedure to obtain a judicial determination of the questions they seek to have reviewed by this action. . . .
>
> "Plaintiffs are not entitled by Section 11(2) of the Act to maintain this action. That Section permits district court enforcement of subpenas only upon suit of the Board, and not of a private party. If the Board declines to institute an *ex rel.* proceeding for the enforcement of a subpena issued at the request of a private party the propriety of this action can be reviewed under Sections 10(e) and (f) of the Act, as described in paragraph 1, above, and such action may not be made the basis for a private suit for injunction in the federal district court, . . ." p. 265.

The attempt in the instant case to circumvent the Board and the General Counsel by petitioning the court in the name of the trial examiner on behalf of private

parties could not legally invoke the jurisdiction of the District Court and it never acquired any.

To hold otherwise and enforce a subpoena which the Board is not asking the court to enforce, would be to take jurisdiction over the trial of unfair labor practice cases away from the Board to which Congress has committed it, subject to wholly adequate judicial review and to give the District Court supervisory jurisdiction over the Board's proceedings. The action of the District Court in this case in attempting to enforce the subpoena duces tecum was an "improvident exercise of judicial discretion," *Myers v. Bethlehem Corp.* (1937) 303 U.S. 41, 52, 58 S.Ct. 459, 82 L.Ed. 638.

In *General Engineering, Inc. v. NLRB* (CA-9, 1965) 341 F.2d 367, this court denied enforcement to an order of the Board where the Board had erroneously revoked subpoenas issued to three regional officers. This court pointed out the principles applicable to the instant case in these words:

> "Since, in this proceeding the Board occupies a position similar to that of a plaintiff in a civil action (see Mitchell v. Bass, 8 Cir., 252 F.2d 513, 517), *it may, for any reason which seems sufficient to it, decline to produce evidence in its possession.* But just as a plaintiff in a civil action could not obtain a judgment if it persisted in withholding evidence which the court determined should be produced, so the Board could not enter an enforceable order if it insists on withholding evidence which, under the rules of evidence in effect in federal district courts, is admissible," (Emphasis supplied) pp. 375-376.

In the court below mention was made of the Public Information Act, Public Law 90-23; 81 Stat. 54; Title 5 U.S.C. § 552; U.S.C. Congressional and Administrative News, 90th Cong. 1st Sess., p. 787, although no serious analysis was made by anyone of just what that Act provided (R. 22). The Public Information Act is, of course, wholly inapplicable to this proceeding, and, in any event, the Respondents Union and Employer did not proceed in accordance with subsection (3) of that Act to elicit the "identifiable records" they sought. The Public Information Act did not change the rule of the *General Engineering* case with respect to what the Board must produce.

No concept of fundamental fairness is offended by Congressional withholding from the courts of jurisdiction to enforce subpoenas except on petition of the Board (or the General Counsel) because, as this court observed in the last paragraph of the *General Engineering* case, the Board can refuse to produce anything it wants to withhold in its own proceedings, subject to the risk of entering an unenforceable order.

The cases cited to the District Court by the Respondents Union and Employer were all cases illustrating the point made by this court in the *General Engineering* case, *supra*, that if the Board erroneously excludes evidence as irrelevant, or, if it erroneously refuses to order the production of evidence which is relevant as a matter of law, the result is that the Board finds itself

with an unenforceable order, *NLRB v. Capitol Fish Company* (CA-5, 1961) 294 F.2d 868; *Harvey Aluminum v. NLRB* (CA-9, 1964) 335 F.2d 749; *NLRB v. Fishermen's Union* (CA-9, 1967) 374 F.2d 974. No case has been cited in which any court has ever enforced a subpoena issued by the National Labor Relations Board on petition of anyone other than the Board or the General Counsel.

In the instant case, the District Court interfered with the conduct of a case not pending in the District Court, as for an injunction, *Sperandeo v. Milk Drivers & Dairy Employees Local U. No. 537* (CA-10, 1964) 334 F.2d 381; but pending before the Board. Congress gave the Board control over its own proceedings subject to judicial review. The action of the District Court was without jurisdiction and void, and amounted to an attempt to deprive the agency of this statutory right of control over its own proceedings.

II

THE SUBPOENA DUCES TECUM WAS NOT ENFORCEABLE IN ANY EVENT

Relying heavily on *Sherry & Gordon, Inc.* (1953) 107 NLRB 113, the Union and the Employer, respondents in the unfair labor practice cases, alleged that the settlement agreement they had signed on June 21, 1967, was an effective settlement and disposed of the pending cases (R. 22-23, 47).

Sherry & Gordon is in no way in point. In that case, an individual filed charges against the union and an employer in May, 1952. A field examiner arranged an informal settlement based on reinstatement, payment to the alleged discriminatee and withdrawal of the charges. All the terms of the settlement were carried out, but for some reason, unbeknowst to the union and the employer, the Regional Director did not sign the withdrawal form. On March 18, 1953, apparently without warning, a complaint issued. Before the Board, the General Counsel argued for the first time that there had, indeed, been a settlement in May, 1952, but that certain conduct in September, 1952, breached the settlement. The trial examiner observed in footnote 5 on page 116 that he was convinced that the Regional Director had approved the settlement in May, 1952.

In the instant case, the settlement was an informal one, entered into on the eve of trial by counsel experienced in labor relations law (R. 12). It was executed in multiples so that each party carried away with him an agreement signed by the Union and the Employer (R. 19). All knew that the Regional Director had not approved the settlement in writing because he was not present in Anchorage (R. 12). Likewise, all knew that Mr. Wilmot himself had not signed as recommending the settlement (R. 42). Within two weeks the Regional Director advised the parties that the settlement would not be approved and explained why (R. 12). No one

was misled. The situation fell squarely within the case of *NLRB v. Campbell Soup Company et al.* (CA-9, 1967) 278 F.2d 259, cert. den., Oct. 16, 1967.

Since the settlement agreement had been executed in multiple, all copies were originals and counsel for both the Union and the Employer had originals which were just as good as Mr. Wilmot's. For that reason alone the subpoena duces tecum should have been revoked and Mr. Wilmot should not have been ordered to comply with it or held in contempt for his failure to do so, *U.S. v. Schine* (D.C.N.Y., 1954) 126 F.Supp. 464.

At the pre-trial conference convened by the trial examiner at the commencement of the hearing of the unfair labor practice cases on October 4, 1967, Mr. Wilmot offered to permit the parties to examine the copies of the settlement agreement then in his file to see whether or not they had been signed by the Regional Director, although he assured them they had not been signed by the Regional Director and, of course, the Regional Director had advised the parties in writing under date of July 5, 1967, that he would not sign the settlement agreements (R. 12, 14, 44).

The "statement" as to telephone calls sought in the second item on the subpoena was equally improper. A subpoena duces tecum can elicit documents and records in existence when the subpoena is served but it cannot compel a witness to compile a list or do any affirmative

act, 97 C.J.S., Witnesses, Section 25(e), page 382, *Traud v. U.S.* (D.C.App., 1965) 232 F.2d 43, 47. Unless Mr. Wilmot just happened to have a list of calls with the information sought noted thereon, and there has been no suggestion that he did, the second item afforded no basis for any enforcement proceedings.

In any event, an offer of proof would have raised the legal issue which the Respondent Union and Respondent Employer were seeking to raise and would have fully protected their legal position. No offer of proof was made.

CONCLUSION

The record before the trial examiner and the District Court shows an attempt to obstruct the trial of four consolidated unfair labor practice cases by the device of trying Ralph Wilmot instead, and this with the complicity of and at the urging of the trial examiner (R. 53, 55, 61-64).

The District Court was utterly without a vestige of jurisdiction to enforce the subpoena in the absence of a petition by the Board or the General Counsel that it be enforced.

The order of enforcement being void, and without jurisdiction, the order adjudging Mr. Wilmot in contempt of it is equally without effect and void, 17 C.J.S., Contempt, § 14, pp. 38-39; *Pueblo Trading Co. v. El Camino Irr. Dist.* (CA-9, 1948) 169 F.2d 312; *U.S. v.*

Thompson (CA-9, 1963) 319 F.2d 665. In the last cited case this court said:

> "We hold, therefore, that a mandate is void which is beyond the power and jurisdiction of the issuing court and that the court may not punish for its violation. Ex parte Rowland, 104 U.S. 604, 26 L.Ed. 861 (1881); In re Sawyer, 124 U.S. 200, 8 S.Ct. 482, 31 L.Ed. 402 (1888); Ex Parte Fisk, 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117 (1885). Thus, the power and jurisdiction of the court to issue a subpoena may be raised for the first time in a proceeding to punish for contempt," p. 668.

Both orders should be vacated.

Respectfully submitted,

ALFRED J. SCHWEPPE

MARY ELLEN KRUG

Attorneys for Intervenor

CERTIFICATE

I certify that, in connection with the preparation of this brief. I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

No. 22297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH WILMOT, Counsel for the General Counsel of the National Labor Relations Board,

Appellant,

v.

DAVID DOYLE, National Labor Relations Board Trial Examiner on relation of LOCAL 959 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT, and GROCERS WHOLESALE, INC.,

Appellees,

and

RALPH WILMOT, in his individual capacity,

Intervenor,

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

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Intervenor.

ADDITIONAL STATEMENT OF JURISDICTION

Appellees invoked the jurisdiction of the District Court under Section 11(2) of the National Labor Relations Act, as amended, 29 U.S.C. 161(2), and under 28 U.S.C. 1337 and 28 U.S.C. 1361, (as stated in appellants' Statement of Jurisdiction). Appellees also contend that the exercise of jurisdiction by the District Court is supported by 5 U.S.C. 552(a)(3) and 5 U.S.C. 555(d).

ADDITIONAL STATEMENT OF THE CASE

A. Supplement to Statement Concerning Proceedings Before the Board

The first two paragraphs of appellant's Statement of the

Case (appellant's brief, pp. 2-3) require amplication for they do not adequately recite the background facts giving rise to the controversy over appellant Wilmot's testimony. The following paragraphs should be substituted therefore:

Appellee Teamsters Union Local 959, of Anchorage, Alaska, and appellee Grocers Wholesale, Inc., an Alaska corporation, are respondents in a consolidated National Labor Relations Board unfair labor practice complaint proceeding (Cases No. 19-CB-1162; 1186; 1189 and 19-CA-3574). A hearing on the consolidated complaint was scheduled for June 20, 1967, at Anchorage, Alaska (R. 11).

On the designated date the attorneys for the parties, including Attorney Wilmot, appeared before the Trial Examiner assigned to hear the case and requested that the hearing not be convened pending certain settlement discussions then under way. The Trial Examiner granted the request of counsel and on the following day, June 21, 1967, a settlement on the pending charges was reached. Attorney Wilmot advised counsel for the appellees, after telephoning his Seattle office, that the settlements had been approved by the Acting Regional Director for the National Labor Relations Board's Nineteenth Regional Office. The Trial Examiner was then informed that settlements had been obtained and he left Anchorage without convening the hearing. On the same day, and subsequently, the terms of the settlement agreements were imple-

mented by the respondents (R. 12).1/

Under date of July 5, 1967, the Regional Director of the Nineteenth Regional Office advised the appellees that he was "unable to approve the settlement agreements" which were signed by the appellees on June 21, and he indicated that the hearing would be re-scheduled. September 12, 1967 was subsequently fixed as the new hearing date, later continued to October 4, 1967 (R. 12).

In contemplation of the re-scheduled hearing, counsel for appellee Local 959 obtained a subpoena duces tecum (No. 70429) from the Nineteenth Regional Office, duly executed by Board member Frank McCulloch, and carrying the seal of the Board. This subpoena was addressed to Attorney Wilmot and directed him to produce at the hearing before the Trial Examiner (1) the original settlement agreements negotiated and executed on June 21, 1967, and (2) a list of the telephone calls between himself and the Regional Office, on June 21, 1967, together with the identification of the persons with whom he communicated (R. 7).

Appellee Local 959 intended to prove, at the re-scheduled hearing, that the pending complaint has been previously settled. It was planned to establish this point through the testimony of Attorney Wilmot and the introduction of the subpoenaed items (R. 12). At the re-scheduled hearing

1/ Reference to the Record on Appeal are designated "R." References to that portion of the Record on Appeal which consist of the reporter's transcript of the proceedings before the District Court are designated "Tr."

appellee Grocers Wholesale joined with appellee Local 959 in the implementation of this strategy. (R.58).

After serving the subpoena on Wilmot, counsel for appellee Local 959 wrote to the General Counsel of the Board, pursuant to Board Rule 102.118, asking that the General Counsel give Wilmot permission to comply with the subpoena (R.14-15). On October 2, 1967, the General Counsel sent a telegraph denying this request (R.16).

The re-scheduled hearing was convened at 10:00 a.m. on October 4, 1967, in Anchorage, Alaska, by National Labor Relations Board Trial Examiner, David F. Doyle (R.25).

The remaining portions of appellant's statement of the case are accepted by appellees as an adequate description of the proceedings before the Trial Examiner and in the District Court.

B. Supplement to Statement Concerning Events Subsequent to Filing of Notice of Appeal

Appellant recites that subsequent to the lodging of the appeals in this matter, the Board entered an order overruling the Trial Examiner and revoking the subpoena (appellant's brief, pp. 8-9). It should be added that on March 13, 1968, appellant filed in this Court, a "Motion to Vacate Judgments of the District Court and to Remand Case with Instructions to Dismiss the Petition as Moot." This motion was based on the contention that the revocation of the subpoena rendered the appeals moot.

On March 28, 1968, the appellees filed an answer to appellant's motion.

On May 2, 1968, this Court entered an order denying

the motion.

ARGUMENT

I. THE ORDERS APPEALED FROM ARE NOT MOOT, AS HAS PREVIOUSLY BEEN DETERMINED BY THIS COURT

The mootness argument set forth in appellant's brief, (pp. 9-11), was separately presented to this Court by means of appellant's "Motion to Vacate Judgment of the District Court and to Remand Case with Instructions to Dismiss the Petition as Moot." On May 2, 1968, this Court denied appellant's motion.

The Court's action disposes of the mootness argument.2/

II. THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION

A. Summary of Argument

The Administrative Procedure Act provides, in part, that a respondent involved in an administrative agency proceeding "is entitled to present...his defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the

2/ In addition to the arguments concerning mootness which were set forth in appellees' answer to appellant's motion, appellees would also call the court's attention to Flotill Products, Inc. v. Federal Trade Commission 278 F.2d 850 (9th Cir. 1960) wherein it was held that once a district court has entered an order enforcing an administrative agency subpoena, the subpoena itself becomes "inoperative and irrelevant." This would suggest that the subsequent revocation of such a subpoena would not, of itself, render the enforcement proceedings moot.

facts" (5 U.S.C. 556(f)).[3] This case involves the question of whether the equity jurisdiction of the United States district courts is available to secure the exercise of this right.

Appellees' primary defense to the unfail labor practice charges concerning which they were asked to stand trial on October 4, 1967, was that such charges had been lawfully and effectively settled and disposed of on June 21, 1967, on the occasion of the previously scheduled hearing.

The subpoena duces tecum issued to Wilmot was vital to the presentation of this defense. Appellees intended to introduce in evidence the original copies of the settlement agreements entered into on June 21, 1967, showing that they had been signed by the appellees, and by the charging parties, and they intended to introduce the oral testimony of Wilmot establishing that the settlement agreements had received the approval of the Acting Regional Director and that all parties concerned, including Wilmot, had understood that the pending charges had been satisfactorily and finally resolved.[4]

3/ Similarly, it is provided in Section 10(b) of the National Labor Relations Act that a person complained of shall have the right to appear in person or otherwise and to "give testimony" in his defense (29 U.S.C. 160(b).

4/ The transcript of the hearing before the Trial Examiner on October 6, 1967, contains a recitation of the particular information which appellees sought to elicit from Wilmot. See Transcript of Board hearing on 10/6/67, pp.60-73, attached to appellees' answer to motion to vacate.

When Wilmot refused to produce the requested documents, or to testify, appellees sought and obtained the assistance of the United States District Court for the District of Alaska.

Wilmot asserts that the jurisdiction of the District Court was wrongfully exercised, contending that the only statutes which gives a district court jurisdiction to enforce Board subpoenaes is Section 11(2) of the National Labor Relations Act, as amended, (29 U.S.C. 161(2)), and that such statute requires that enforcement proceedings be instituted "in the name of the Board." He states:

> "If the Board refuses to institute a subpena enforcement proceeding on relation of a private party, then that subpena cannot be enforced." (Appellant's brief, p. 12).

Biazevich v. Becker, 161 F.Supp. 261, 41 LRRM 2782 (D.C. S.D. Calif. 1958) and other district court opinions, all of which rely on Biazevich, are cited in support of this contention (appellant's brief, p. 11-12). In Biazevich, district judge Yankwich ruled that a respondent in an unfair labor practice proceeding cannot, by himself obtain court assistance concerning the enforcement of subpoenaes duces tecum issued to Board officials. His ruling rested on a literal reading of Section 11(2) of the National Labor Relations Act and upon his opinion that Section 11(2) could not be enlarged by anything in the subpoena provisions of the Administrative Procedure Act. He said:

> "Plaintiffs are not entitled by Section 11(2) of the Act to maintain this action. That Section permits district court enforcement of subpenas only upon suit of the Board, and not of a private party. If the Board declines to institute

an ex rel proceeding for the enforcement of a subpena issued at the request of a private party the propriety of this action can be reviewed under Sections 10(e) and (f) of the Act, as described in paragraph 1, above, and such action may not be made the basis for a private suit for injunction in the federal district court. This conclusion is not altered by Section 6(c) of the Administrative Procedure Act, which does not enlarge the Act's subpena enforcement procedures."

Judge Yankwich's analysis could be regarded as "dicta" for the particular subpoenaes which were at issue in the case were revoked before the Judge made his ruling and the rejection of jurisdiction could rest on this factor, and not on the limitations of Section 11(2).[5/] However, appellees hope to successfully demonstrate that regardless of the legal significance of Judge Yankwich's ruling, such ruling was erroneous and should not be followed here.

Appellees submit that under the circumstances of this case, the District Court was possessed of necessary jurisdiction to enforce the Wilmot subpoena. Such jurisdiction rests upon:

(1) The provisions of Section 11(2) of the National Labor Relations Act, (29 U.S.C. 161(2)). Various considerations support a broad construction of this Section including a review, in pari materia, of the provisions of Section 6 of the Administrative Procedure Act, (5 U.S.C. 555) and of the provisions of revised Section 3 of the

5/ As was said in the opinion, "The subpenas in question have been revoked by the Board, so that in any event there is nothing before the Court to enforce". The same situation prevailed in the other district court cases which have relied upon Biazevich.

Administrative Procedure Act (i.e., the Public Information Act; 5 U.S.C. 552), or

(2) The provisions of Section 1337 of the Judical Code (28 U.S.C. 1337), or

(3) The provisions of Section 1361 of the Judical Code (28 U.S.C. 1361).

A discussion of these provisions follows.

B. Jurisdiction Exists by Reason of Section 11(2) of the Act.

As Wilmot emphasizes, Section 11(2) of the Act (29 U.S.C. 161(2)) states that a United States district court shall have jurisdiction to issue orders enforcing Board subpoenaes "upon application by the board." However, Section 102.31(d) of the Board's Rules and Regulations recites that such applications will be instituted by the General Counsel rather than the Board. The Section reads:

> "Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpena would be inconsistent with law and with the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court."

It is clear from the record in the instant case that neither the Board, nor the General Counsel, would have applied to the District Court for enforcement of the Wilmont subpoena, even

f they had been requested to do so.[6/] It was the position of the eneral Counsel throughout the proceeding that Wilmot should not e required to testify and the Board apparently felt likewise, as s evident by its subsequent action in revoking the subpoena. ndeed, during the hearing in the District Court, Wilmot acknowl-dged, "Now, I agree that were applications to be sought, it would ost likely be denied, since I have been instructed not to tes-ify." (Tr. 14).

Thus, the question is whether a private litigant is free o initiate a proceeding for court enforcement of a subpoena in ircumstances where it is evident that neither the Board nor the eneral Counsel will undertake such responsibility. Section 11(2) s literally applied, as it was in Biazevich, supra, the answer ould be in the negative. But, "the literal reading of a statute s not necessarily the correct one. The policy and spirit of the aw must be heeded." Richmond F.&P.R. Co. v. Brooks, 197 F.2d 04 (D. C. Cir. 1952)

It is firmly established that in interpreting statutes he primary objective is to give effect to the intent of Congress

/ It is to be noted that there is no provision in the statute, or in the rule, specifying that a party must make a formal request to the Board or the General Counsel in order to initiate a subpoena enforcement proceeding. Assuming that such a procedure is implied, the making of a request to obtain court enforcement should be excused where it is obvious that the request would be denied. The law does not require the doing of useless acts and legislation should not be read in such a spirit. United States v. Big Bend Transit Co., 42 F.Supp. 459 (D.C. E.D. Wash. 1941). See also Seaboard Air Line Railroad Co. v. United States, 131 F.Supp. 129 (D.C. E.D. Va. 1954), and McLean v. Texas Co., 103 F.2d 989 (5th Cir. 1939)

and where a literal application of the words of the statute would lead to unjust, absurd or futile result, such an application is to be avoided. In such an instance, the language will be broadly construed consistent with the general purpose of the statute. "The reason of the law should prevail in such cases over its letter." United States v. Kirby, 7 Wall 482 at p.487, 19 L.ed 278 (1869). Also, United States v. American Trucking Association, 310 U. S. 534, 60 S. Ct. 1059 (1940) (and cases cited therein at p. 543); Lau Ow Bew v. United States, 144 U. S. 47, 12 S. Ct. 514 (1892); Consumers Union of the United States v. Walker, 145 F. 2d 33 (D. C. Cir. 1944); Miller v. Bank of America, 166 F. 2d 415 (9th Cir. 1948); Swan Island Club v. Yarbrough, 209 F. 2d 698 (4th Cir. 1954); Commonwealth of Virginia v. Cannon, 228 F. 2d 313 (4th Cir. 1955).

The following considerations justify a non-literal interpretation of Section 11(2), as applied to the facts of this case.

1. With reference to the enforcement of a subpoena issued to a private party, the requirement for an "application by the Board" is a matter of form and not of substance.

Neither the statute nor the rule requires the Board, or General Counsel, to actually prosecute the enforcement proceeding where a subpoena issued to a private party is involved. Quite to the contrary, the rule states the General Counsel will merely initiate the proceeding "on relation of [the] private party" and that neither the General Counsel nor the Board "shall be deemed to have assumed responsibility for the effective prosecution of

the same before the Court." (Bd. Rule 102.31(d)) Thus, the real parties in interest are the party at whose request the subpoena was issued and the person to whom it runs. In these circumstances, the statutory reference to the "application by the Board" is a matter of form and not of substance. "It is the substance, not the form, which should be our concern." United States v. New York, New Haven & Hartford Railroad Co., 355 U.S. 253, at p. 263, 78 S.Ct. 212 (1957).

In an effort to honor "form" appellees did caption the District Court pleadings in the name of the Trial Examiner, after securing his permission to do so.

2. A consideration of the purpose of the National Labor Relations Act supports a broad interpretation of the subpoena enforcement provisions of Section 11(2).

In their research, appellees uncovered no substantial policy arguments supporting a literal interpretation of Section 11(2), as applied to the enforcement of a subpoena issued to a private party. On the other hand, a consideration of the intent and purpose of the National Labor Relations Act, as amended, gives support to a broad interpretation. The Act has as its purpose the protection of commerce from industrial strife through the providing of "orderly and peaceful procedures for preventing the interference by either [employees or employers] with the legitimate rights of the other." (29 U.S.C. 141(b)).

The main "procedure" made available to accomplish the statutory purpose is that which concerns the prevention of unfair labor practices (29 U.S.C. 160). This procedure calls for the

resolution of unfair labor practices through the issuance of complaints and the holding of hearings. It is expressly provided that at such a hearing, a party proceeded against "shall have the right...to appear in person or otherwise and give testimony...." (29 U.S.C. 160(b). It is further provided that the hearing shall be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the "rules of civil procedure for the district courts," and that the Board shall make its determination" upon the preponderance of the testimony." (29 U.S.C. 160(b) and (c)).

Allowing private parties to petition for enforcement of subpoenaes is consistent with the purpose of the statute and the procedures which it established. Such an interpretation would protect the right of parties to "give testimony" supporting their positions, and would insure that all relevant and pertinent testimony and evidence would be before the Board, when the Board exercises its judicatory responsibilities. It would also facilitate "orderly" hearings by expediting the taking of testimony.7/

> "If possible the Act must be so construed as to make its various provisions workable. If the free flow of commerce is to be promoted under this Act, the operation and actions thereunder must be prompt. Undue and unnecessary delays in proceedings of the Board might well render such proceedings ineffecture and result in defeating the purposes of the Act." N.L.R.B. v. John S. Barnes Corp., 178 F.2d 156 (7th Cir. 1949).

7/ If an application for enforcement cannot be filed by a private party, the only other remedy would be an appeal to the Court of Appeals pursuant to Section 10(A) of the Act (29 U.S.C. 160(A)). This is a lengthy and expensive procedure. See discussion, infra, p 22 .

Looking beyond the National Labor Relations Act for a moment it is also significant that Congress appears to have no uniform practice with respect to the drafting of subpoena enforcement provisions. While we did not have an opportunity to do a complete survey, we did note two statutes relating to government agencies having investigatory and adjudicatory functions, which expressly allow private parties to seek enforcement of agency subpoenaes.

Section 503(d)(1) of the Housing Act of 1954 provides, in part:

> "The [Federal Home Loan Bank Board] or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have the power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the board or any interested party may apply to the United States District Court where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and such court shall have power to order and require compliance therewith." (12 U.S.C. 1464(d)(1)) (emphasis added)

Similarly, Section 408(e) and (f) of the Federal Communications Act of 1934, as amended, state:

> "Subpenas; witnesses; production of documents; fees and mileage.
>
> "For the purpose of this chapter the [Federal Communications Commission] shall have the power to require by subpena the attendance and testimony of witnesses the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.
>
> "Designated place of hearing; aid in enforcement of orders.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section." (47 U.S.C. 409(e) and (f)) (emphasis added)

There would appear to be no sound reason why the Congress would deliberately permit a private party involved in Federal Communications Commission litigation to seek court enforcement of an agency subpoena and deny that right to a private party involved in National Labor Relations Board litigation. This circumstance militates strongly against a rigid interpretation of Section 11(2).

3. A consideration of the Administrative Procedure Act supports a broad interpretation of the subpoena enforcement provisions of Section 11(2).

Section 6(d) of the Administrative Procedure Act reads as follows:

"Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the supoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for the enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." (5 U.S.C. 555(d)).

It is established that the foregoing provision is in pari materia with the specific statutes relating to the subpoena powers of the individual government agencies. Federal Maritime

v. New York Terminal Conference, 262 F.Supp. 225 (D.C. S.D. N.Y. 1966), affirmed 373 F.2d 424 (2nd Cir. 1967); Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 291 F.2d 354 (9th Cir. 1961); Long Beach Federal Savings and Loan Assoc. v. Federal Home Loan Bank Board, 189 F.Supp. 585 (D.C. S.D. Calif. 1960).[8/]

It has been so held with respect to the subpoena provisions contained in Section 11 of the National Labor Relations Act. NLRB v. International Typographical Union, 76 F.Supp. 895, 21 LRRM 2483 (D.C. S.D. N.Y. 1948). It was stated in this case that the subpoena provisions of the Administrative Procedure Act and the subpoena provisions of the National Labor Relations Act must be "read together."

Section 6(d) does not in any way limit or restrict the identification of the parties who may initiate subpoena enforcement proceedings. The statute recites that "on contest" the court shall sustain the subpoena if found to be in accordance with law and further, that "in a proceeding for enforcement," the court shall issue an order requiring compliance with the subpoena. The failure of Congress to specify which parties are privileged to initiate a proceeding for enforcement, or to distinguish in this regard between the enforcement rights of a government agency, and

8/ See also: Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949), cert. denied 338 U.S. 860; Shasta Minerals & Chemical Co. V. Securities and Exchange Commission, 328 F.2d 285 (10th Cir. 1964); Rafal v. Fleming, 171 F.Supp. 490 (D.C. E.D. Va. 1959); Tobin v. Banks & Rumbaugh, 201 F.2d 223 (5th Cir. 1953); Deering Milliken, Inc. v. Johnston, 193 F.Supp. 741 (D.C. N.C. 1961).

a private litigant, is a clear indication that Congress wanted no such limitation or differentiation imposed. Indeed, both the House and Senate reports concerning the Administrative Procedure Act expressly state that the general purpose of the subpoena provision was to insure that "private parties would have the same access to subpoenaes as that available to the representatives of agencies." Sen. Rep. 752, 79th Cong. 1st Sess; House Rep. 1980, 79th Cong. 2d Sess. (both reports are reproduced in Pike and Fischer, Administrative Law Dest Book)[9/]

If the provisions of Section 6(d) are read together with the provisions of Section 11(2) of the National Labor Relations act, and an effort is made to "harmonize" both statutes, it can only be concluded that Section 11(2) should be interpreted broadly to permit enforcement proceedings at the instance of a private party, at least in the circumstances revealed in this case.

Congressional policy in this area is also demonstrated by the amendments which were recently made to Section 3 of the Administrative Procedure Act by the terms of the Public Information Act of 1966. These amendments have been codified in 5 U.S.C. 552.

The basic purpose of the recent amendments, as President Johnson explained when he signed the bill, is to provide for the

9/ It is also to be noted that the Senate Report recites that the purpose of the entire Act was to lay down the minimum requirements of "fair administrative procedure." It can hardly be contended that a procedure which recognizes the right of the government to enforce a subpoena which it needs, while denying the same right to a private litigant, is "fair." See Inland Steel Co. v. NLRB, 109 F.2d 9, at p. 18-28 (9th Cir. 1940). See also the discussion, infra at p. 20 .

disclosure of information in the hands of government agencies. He said " . . . freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted." (Pike and Fischer, Administrative Law Desk Book, P. Stat-208).

The amendments provide that an agency must publish general information concerning its operation, including statements of its formal and informal procedures, statements of policy, and rules and regulations, and must make available to the public, upon request, copies of opinions and other materials (5 U.S.C. 552(a)(1) and (2)). It is also provided that an agency must produce, upon request, "identifiable records" in its possession. If an agency declines to produce such records, then "on complaint," a United States district court would have jurisdiction to enter an order compelling production (5 U.S.C. 552 (a)(3)).

The enactment of these amendments reflects a strong congressional policy in favor of the disclosure of information in the possession of the government. A broad interpretation of Section 11(2), as applied to the facts of this case, would be fully consistent with this policy.

4. The Board has frequently argued for a broad interpretation of the subpoena enforcement provisions of Section 11(2)

The appellant's contention that Section 11(2) should be strictly or literally interpreted is inconsistent with arguments made by the Board (through its General Counsel) in other cases. The Board has often argued for a broad interpretation of Section 11, and its arguments have been successful.

In NLRB v. Duval Jewelry Co., 357 U.S. 1 , 78 S. Ct. 1024 (1958), it was held, at the Board's urging, that the sentence in Section 11(1) which states that upon request the Board shall revoke a subpoena duces tecum if, in its opinion, the statutory requirements are not satisfied, would be broadly construed to permit the Board to delegate its powers to a regional director or hearing officer. See also Lewis v. NLRB, 357 U.S. 10, 78 S. Ct. 1029 (1958).

In NLRB v. International Typographical Union, 76, F. Supp. 895, 21 LRRM 2483 (D.C. S.D. N.Y. 1948), a subpoena duces tecum was issued to the president of the respondent union. He refused to comply with the subpoena, and the General Counsel then brought an application to enforce in the name of the Board. The application was signed and verified by the General Counsel. It was argued, on a motion to dismiss the enforcement proceeding, that Section 11(2), literally interpreted, requires that enforcement can be obtained only "upon application by the Board" and that, to the extent that the Board's rules authorized the General Counsel to initiate enforcement proceedings, such rules were invalid. The district court rejected the literal approach and held that the Board's authority to institute an enforcement proceeding could be delegated to the General Counsel.

In a brief recently filed with this Court in British Auto Parts, Inc. v. N.L.R.B., Docket No. 21, 883, the General Counsel points out that Section 11 has been "broadly construed" by the courts in the interest of permitting the Board to obtain

information needed in the performance of its duties (brief, p. 22).10/

5. A broad interpretation of Section 11(2) avoids a constitutional question. Unless appellees can seek district court assistance in enforcing the Wilmot subpoena, they would be denied "equal protection of law."

An interpretation of a statute which avoid a constitutional issue is favored. United States v. Congress of Industrial Organizations, 335 U.S. 106, at p. 120-121 68 S. Ct. 1349 (1948); United States v. Hanis, 347 U.S. 612, at p. 618, 74 S. Ct. 808 (1954), as stated in American Communications Assoc. v. Douds, 339 U.S. 382, 70 S. Ct. 674 (1950):

> "It is within the power and the duty of this Court to construe a statute so as to avoid the danger of unconstitutionately if it may be done in consonance with the legislative purpose." (at p. 407)

If, in this case, Section 11(2) is interpreted to give the district court jurisdiction only on a petition by the Board, a question of "due process of law" arises. The due process protection available to a litigant in a proceeding initiated by a federal agency derives from the 5th amendment and includes protection against unjustifiable statutory discrimination. Such protection is comparable to that given by the "equal protection" clause of the 14th amendment. As observed by the Supreme Court, "...the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." Bolling v. Sharpe, 347 U.S. 497, at p. 499, 74 S. Ct.

10/ The brief filed by General Counsel in British Auto Parts is also pertinent to a discussion of 28 U.S.C. 133 See infra, p. 26 .

693 (1954). See also Dawson v. Mayor and City Council of Baltimore City 220 F.2d 386 (4th Cir. 1955); Hansen v. Union Pac. R. Co., 71 N.W. 2d 526 (Neb. 1955)).

Equal protection of the law implies that "all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination." Republic Pictures Corp. v. Kappler, 151 F. 2d 543 (8th Cir. 1945), affirmed per curiam 327 U. S. 757, 66 S. Ct. 523 (1946).

It is true, as appellant asserts in his brief (p. 12-13), that Sections 10(e) and (f) of the Act (29 U.S.C. 160(e) and (f) contain an appeal procedure available to the appellees, but a close examination of that procedure reveals that it does not provide an adequate remedy, considering the circumstances, nor is it equal in any degree to the remedy available to the government, in a like situation. Consider the following comparison:

Remedy Followed By General Counsel

> If a witness subpoened by General Counsel refuses to testify, General Counsel would immediately petition the nearest district court for enforcement pursuant to Section 11(2). Assuming that the court enforced the subpoena, and thus caused the recalcitant witness to testify, the delay in the unfair labor practice case hearing could be measured in days, and the cost to the parties would be minimal. Even if the witness took an appeal to a United States Court of Appeals, the delay would not be undue. Some circuits would expedite such an appeal. "Because it is important that the adjourned unfair labor practice proceeding be resumed as soon as possible we have expedited the appel." N.L.R.B. v. Friedman, 352 F.2d 545, 60 L.R.R.M. 2258 (3rd Cir. 1965).

Remedy Suggested For Appellees

If a Section 11(2) proceeding is not available to appellees, and they are relegated to a Section 10(f) appeal, the course of events would be something like this.

Step 1. The Trial Examiner would proceed with the hearing, without the benefit of Wilmot's testimony sought by appellees. See N.L.R.B. St. of Proc. 101.10.

Step 2. Following the hearing the Trial Examiner would prepare a decision. Assuming that the Wilmot testimony was critical to appellees defense, the Examiner might conclude, in the absence of such evidence, that the appellees are guilty of the unfair labor practices as charged. See NLRB St. of Proc. 101.11(a).

It takes an average of 114 days for Examiners to prepare reports following the close of a hearing.[11/]

Step 3. The appellees would file exceptions to the Trial Examiner's decision with the full Board. See NLRB St. of Proc. 101.11(b)

Step 4. The Board would issue a decision and order. Assuming that the Board would stand behind its previous action in revoking the subpoena, it is likely that the Board would affirm the Trial Examiner. See NLRB St. of Proc. 101.12.

It takes an average of 105 for the Board to render a decision following the issuance of a Trail Examiner's opinion. [12/]

Step 5. The appellees would appeal to the Court of Appeals. See Act, Sec. 10(f).

Step 6. The Court of Appeals would issue a decision. It the Court of Appeals determined that the

1/ See testimony of General Counsel Ordman before House Special Labor Subcommittee, February 9, 1966, reported in BNA Labor Relations Yearbook 1966, p. 339-340.

2/ See previous footnote.

subpoenaed evidence was relevant and necessary to the proceeding, the Court would remand the case to the Board with instructions to take such testimony.

Step 7. On remand, the subpoenaed testimony would be presented, the Trial Examiner would write a new decision, taking such testimony into account. If the new decision were unsatisfactory to any party, the chain of appeal procedures outlined above would start over.

As noted above, it would take 114 days for the initial Trial Examiner's opinion and 105 days beyond that to obtain a Board opinion. We can cite no statistics concerning the time necessary to obtain a decision of the Court of Appeals, but an estimate of 180 days might be appropriate.

Thus the "remedy" available to appellees would consume more than 399 days and require the incurring of attorneys' fees and printing cost running into thousands of dollars.

It is clear, from these examples, that if the appellees are relegated to the normal appeal procedures in order to obtain the enforcement of their subpoena, while General Counsel, in a like situtation, could promptly seek recourse in a district court proceeding, the appellees have been denied equal protection of the law.

6. Conclusion

For all the reasons stated in this section of the brief, appellees urge that Section 11(2) be given a broad construction and that it be held that the District Court had jurisdiction, under Section 11(2), to enforce the Wilmot subpoena upon application by the appellees.

C. Jurisdiction Exists by Reason of 28 U.S.C. 1337

An independent basis for the exercise of jurisdiction by the District Court is Section 1337 of the Judicial Code, reading as follows:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Commerce regulating commerce or protecting trade and commerce against restraints and monopolicies." (28 U.S.C. 1337).

In Capital Service, Inc. et al v. N.L.R.B., 347 U.S. 501, 74 S. Ct. 699 (1954) the Court held that Section 1337 gives a district court jurisdiction in civil actions or proceedings under the National Labor Relations Act. The Supreme Court said:

> "The District Court had jurisdiction of the subject matter, because this is a 'civil action or proceeding' arising under an Act of Congress 'regulating commerce.' 28 U.S.C. Sec. 1337. The National Labor Relations Act is a law 'regulating commerce' (National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 14, 57 S. Ct. 615, 81 L. Ed 893)." at p. 504.

Where there are no available remedies under the specific terms of the Act or where those remedies are not adequate to protect statutory and constitutional rights, the equity power of the United States district courts has been invoked under 28 U.S.C. 1337. The Board itself has successfully invoked the jurisdiction of district courts in such circumstances, i.e., Capital Service, supra; N.L.R.B. v. New York Labor Relations Board, 106 F.Supp. 749 (D.C. S.D. N.Y. 1952); and Farmer v. United Electrical Workers, 211 F.2d 36 (D.C. Cir. 1954), as have private parties involved in Board proceedings, Camp v. Herzog, 104 F. Supp. 134

(D.C. D.C. 1952); Leedom v. Kyne, 358 U.S. 184 (1958); Deering Milliken, Inc. v. Johnston, 193 F. Supp. 741 (D.C. N.C. 1961); Local Union No. 112 Allied Industrial Workers v. Rothman, 209 F. Supp. 295 (1962;

It is true, as appellant asserts, that the exercise of jurisdiction under Section 1337 has been denied, in many instances, because the court has determined that suitable remedies are available under the Act. However, we have demonstrated, in the earlier portion of this brief, that there is no adequate remedy available to appellees under the terms of the Act.

It is also relevant that in approaching the District Court we did not seek to overturn a Board ruling or decision, as was the case in Boire v. Greyhound Corp., 376 U.S. 473 (1964) and in the other cases cited by appellant. We sought the assistance of the District Court solely to compel Wilmot's testimony in the hearing then proceeding before the Trial Examiner. The exercise of District Court jurisdiction, in this instance, would facilitate, not frustrate, the administrative process.

A case which involved the power of a district court to enforce a subpoena, under Section 1337, is United States v. Feaster, 330 F.2d 671 (5th Cir. 1964). In that case, the National Mediation Board asked for court enforcement of a subpoena it had issued to the Alabama State Docks Department in connection with a representation proceeding under the Railway Labor Act. There was no provision in the Act providing for the enforcements of subpoenas. It was held that the district court "has the power" to grant the requested relief. See also, United States v. Feaster

376 F.2d 147 (5th Cir. 1967).

Appellant would undoubtedly distinguish Feaster by emphasizing that there was no specific subpoena enforcement provision in that case, whereas here we have Section 11(2). In his brief, appellant argues "Since by the terms of a specific law only the Board is empowered to petition the courts for enforcement of its subpoenas, the general grant of jurisdication established by Section 1337 cannot be relied upon to accomplish the same result at the request of a private party." (brief p. 15)

Appellant assumes too much. Nothing in Section 11 (2) states that it constitutes the only enforcement procedure in connection with Board hearings and investigations, nor is there any sound reason (and appellant suggests none) why it should be so interpreted.

That Section 11 (2) does not constitute an exclusive remedy concerning the enforcement of Board subpoenas was fully acknowledged by the General Counsel in N.L.R.B. v. British Auto Parts Inc. ____F.Supp._____, 64 LRRM 2786 (D.C. C.D Calif. 1967). In this case General Counsel was seeking the enforcement of a subpoena directing an employer to produce, for purposes of a representation proceeding, a list of the names and addresses of its employees. The employer challenged the jurisdiction of the court, arguing that the list did not constitute "evidence" as that term is used in Section 11(1) and, therefore, the subpoena could not be enforced by a district court under the provisions of Section 11(2). In response, General Counsel argued that even if Section 11(2) were not available, the district court had the necessary

jurisdiction to enforce the subpoena under 28 U.S.C. 1337. The district court accepted this contention and ruled:

> "Even if the addresses of the employees are not considered to be 'evidence' within the meaning of Section 11 (1) of the Act, the Court would issue an injunction directly enforcing the Board's Excelsior rule. District Courts have jurisdiction under 28 U.S.C. Sec. 1337, "of all suits and proceedings regulating commerce." This statutory provision vests the district courts with jurisdiction to aid administrative agencies in carrying out their Congressionally authorized powers and duties, despite the absence of any express grant of district court jurisdiction under the agencies respective enabling acts." (citing cases)

British Auto Parts is now on appeal to this Court (Docket No. 21, 883) and the brief filed by General Counsel contains several pages devoted to the proposition that the district court had jurisdiction under Section 1337. (General Counsel's brief pp.29-35). The arguments and citations contained in that brief (including heavy reliance upon United States v. Feaster, supra) fully support appellees position here, and we adopt such arguments and citations by this reference.

If district court equity powers are available to General Counsel, under 28 U.S.C. 1337, in a situation where General Counsel is unable to proceed to enforce a subpoena under Section 11(2), so also, in the instant case, such powers are available to appellees in their effort to enforce the Wilmot subpoena.

D. Jurisdiction Exists By Reason Of 28 U.S.C. 1361

28 U.S.C. 1361 gives district courts original jurisdiction of actions "in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff." In Knoll Associates Inc. v. Dixon, 232 F. Supp 283 (D.C. N.Y. 1964) the plaintiff claimed that the hearing examiner in a Federal Trade Commission hearing erred in refusing to call Commission attorneys to testify concerning their complicity in an alleged unauthorized removal of certain documents. Plaintiff claimed the hearing examiner also erred in denying plaintiff's motion for the production of documents in the files of the Commission relating to the Commission's communications with a witness with which such attorneys allegedly "cooperated." The court said:

> "Certainly it is clear that if, in the course of the proceedings before the Hearing Examiner, any of plaintiff's constitutional rights were disregarded, or if a substantial unfairness were accorded plaintiff there so that a fair and impartial hearing was denied it, or the proceedings were tantamount to an unwarranted trespass upon its rights, this Court should not hesitate to step in. Under 28 U.S.C. Sec. 1361, the Court has jurisdiction to compel the performance of a duty, and this goes for beyond ministerial duties, for fundamental trial rights are not immaterial." p.285

Since the notable statute of Elizabeth in 1562-63 the duty to attend a court hearing after proper service has been expressly recognized at common law and, 100 years earlier, such duty was recognized in Chancery: 8 Wigmore, Evidence Sec. 2190 footnotes 17 & 19; as Wigmore states, in Section 2192. "For more than three centuries it has now been recognized as a

fundamental maxim that the public (in the words sanctioned by Lord Hardewiche) has a right to every man's evidence." In United States v. Bryan, 339 U.S. 323 (1950), at p.331, the Court spoke of the duty of a subpoened witness to testify, stating that "every person within the jurisdiction of the Government is bound to perform (such duty) when properly summoned."

Wilmot as a public employee and attorney would appear to have even a greater duty to society than other witnesses. Nevertheless, Wilmot refused to testify and produce evidence in accordance with a properly issued subpoena, duly enforced by order of the Trial Examiner. The District Court has jurisdiction under 28 U.S.C. 1361 to compel the testimony of Wilmot in order to alleviate the substantial unfairness which would otherwise result.

Cases cited by appellant (brief p.15-16) are inapplicable to the facts of the instant case for the reason that the plaintiffs therein attempted to invoke Section 1361 to compel the exercise of a discretionary authority or conduct. In the present case the district court was merely requested to compel and enforce testimony, and the production of settlement agreements, concerning which no discutionary authority or conduct was involved.

III. THE GENERAL COUNSEL IS NOT AN INDISPENSABLE PARTY.

Appellant cites Williams, et al, v. Fanning, 332 U.S. 490, 68 S. Ct. 188 (1947), for the proposition that the General Counsel is an indispensable party. To the contrary, Williams reversed the circuit court and district court decisions that

held the Postmaster General was an indispensable party. In Williams, the Postmaster General issued a fraud order directing Postmaster Fanning to refuse payment of any money order payable to Williams, to stamp "fraudulent" on all of Williams' mail and to return all mail to the senders. The Supreme Court noted and commented on the existing conflict among the circuits:

> . . . a conflict among the circuits developed in these postal fraud cases. National Conference on Legalizing Lotteries v. Goldman (CCA2d NY) 85 F2d 66, which held that the Postmaster General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even thought the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing -- he need not be required to take new action either directly as in the Smith and Fall Cases or indirectly through his subordinate as in the Rutter Case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command." p. 493

Comparing the facts of the instant case with Williams, we find that Wilmot, like Postmaster Fanning, had received a direct order from his superior, General Counsel, i.e., "to refuse to testify." (Tr. 14) Similarly, the relief requested will expend itself on the subordinante official, Wilmot, as was the case with Postmaster Fanning. In both instances the subordinate

official is left under the command of his superior to do what the court has forbidden. However, the Supreme Court has held this fact to be immaterial. Clearly, the requested conduct of Postmaster Fanning, approved by the Supreme Court in Williams, is no different than the conduct required of Wilmot by the Court below.

Appellant cites three additional cases which are inapposite to the facts of this case. Vapor Blast Independent Shopworkers' Ass'n v. Simon, 305 F.2d 717 (7th Cir. 1962) held that the National Labor Relations Board members were indispensable parties. This case is inapposite for the reason that the Board is charged with enforcement of its own orders and the court would not entertain by way of mandus enforcement save as presented by the Board.

Likewise in Dombrovskis v. Esperdy, 321 F.2d 463 (2nd Cir. 1963) the Court found that the Secretary of State was an indispensable party, where the authority to issue visas was lodged in the Department of State. The Court states. "since appellee has no power to grant the relief sought by appellants, issuance of a decree against the appellee would be a useless act."

Finally, in Harris v. Smedile, 320 F.2d 661 (7th Cir. 962) the Court was requested to order the District Engineer to ancel a permit for construction off a lakeshore. The Court held hat the Secretary of the Army had exclusive jurisdiction to do hat the district court was asked to force the District Engineer o do. Moreover, the Department had, by regulation, expressly

provided that the District Engineer was "without authority to cansel or revoke permits."

In somewhat similar situations, National Labor Relations Board members have not been considered indispensable parties. Significantly, the basis for these decisions is the difficulty of joining Board members, fundamental fairness to the parties and the policy of the National Labor Laws to reduce and mitigate labor disputes. Brotherhood and Union of Transit Employees of Baltimore v. Madden, Regional Director, 58 F. Supp. 366 (D.C. M.D. 1944); Deering-Milliken, Inc. v. Johnston, 193 F. Supp. 741, 744, (D.C. N.C. 1961); See also, W. I. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860, 862-3, (D.C. Pa. 1963).

In summarizing the cases cited, Williams v. Fanning is clearly controlling but not in the manner suggested by appellent herein. To the contrary, Williams reversed the proposition which appellant suggests is controlling by holding that the Postmaster General was not an indispensable party. In the additional cases cited by the appellant, an indispensable party was found for the reason that the defendant before the court did not have the abil-ity or power to effectuate the relief desired. In the present case, Wilmot has the ability and power to testify and produce documents in response to a subpoena duly issued by the Regional Director. Clearly the relief requested will expend itself on the subordinate official without further action being required by the General Counsel. For the reasons stated the General Counsel is not an indispensable party.

IV THE SUBPOENA DUCES TECUM WAS ENFORCEABLE

In the brief filed by Wilmot, in his individual capacity, it is argued (at p. 16-19) that, on the merits, the Trial Examiner erred in refusing to revoke the subpoena and, hence, the district court erred in enforcing the subpoena.

It is said that Wilmot's testimony was not needed because appellees have in their possession copies of the signed settlement agreements. This is not the case. The copies which were furnished to appellees, at the time, were not signed. Subsequently, Wilmot advised that the charging parties (i.e., those who initiated the unfair labor practice proceeding) had signed the original copies. These original copies are in his possession and it is these copies which appellees seek to have him produce. The purpose is to show that the charging parties were parties to the settlement and that, by their signatures they like the appellees, considered that the charges were fully and finally resolved.

It is also contended that any testimony and evidence concerning the settlement agreements would be irrelevant in light of N.L.R.B. v. Campbell Soup Company, 278 F. 2d 259 (9th Cir. 1967) wherein it was held that the Board could require that settlement agreements be considered effective only when signed by a Regional Director. This argument begs the issue. The Trial Examiner can hardly determine whether Campbell Soup, bars a consideration of the settlement agreements in this case until all the facts and circumstances concerning their agreement, and their negotiation, are disclosed.

It is appellees' position that when all the facts are disclosed, Campbell Soup will be found to be inapplicable and, further, that any requirement for the signing of settlement agreements by the Regional Director was effectively waived, in this case, when the Acting Regional Director specifically approved the agreements by long distance telephone.

The Trial Examiner did not abuse his discretion by denying the motion to revoke the Wilmot subpoena and the District Court did not abuse its discretion in enforcing the subpoena.

CONCLUSION

In N.L.R.B. v. Kingston Traps Rock Co., 222 F.2d 299, 36 L.R.R.M. 2106 (3rd Cir. 1955), the court characterized the conduct of an employer, who was attempting to avoid complying with a subpoena duces tecum issued at the request of the General Counsel, as "patently dilatory and obstructive and totally unjustifiable." These are strong words but they are applicable here.

The conduct of Wilmot in flatly refusing to testify in this matter, because of instructions from the General Counsel based on a non-disclosure rule which this Court, and others, have on numerous occasions held to be inapplicable in the absence of a genuine assertion of privilege, is "patently dilatory and obstructive and totally unjustifiable." The District Court possessed the necessary jurisdiction to compel Wilmot's testimony. The exercise of that jurisdiction should be affirmed and the

the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

_____

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No. 22297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellant,

v.

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Appellees.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

REPLY BRIEF FOR THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

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I. THE ISSUE OF MOOTNESS

Appellees argue (Br., p. 5) that the denial of appellant's ion to vacate the judgment of the District Court as moot "disposes" the contention that the subpena enforcement proceedings in the District rt were mooted by the Board's subsequent revocation of the subpena. believe such a claim is incorrect. The language of the Court's order s not indicate that the Court decided the substantive question of tness; rather, it appears that the Court simply denied the motion at t time without prejudice to our right to raise it in the argument on merits. Even assuming that the Court did rule on the question of

ness, it would not, of course, be precluded from reconsidering appel-
's contentions now. Cf. Ferretti v. Dulles, 246 F. 2d 544, 545, 547
. 2).

Appellees next contend that subsequent revocation of an admin-
ative subpena does not render district court enforcement proceedings
in any event because the entry of an order enforcing the subpena
s the continued existence of the subpena itself "irrelevant" (Br.,
, n. 2). This assertion is incorrect. As the Court of Appeals for
Tenth Circuit has recognized:

> The only power conferred upon the District Court is to issue an order directing obedience to a subpoena by the Board in a proceeding under consideration before it. Certainly such a proceeding is not complete in itself. It comes into being only as an aid to a proceeding pending before the Board. Aside from that, it has no purpose.

hy Packing Co. v. N.L.R.B., 117 F. 2d 692, 694. Thus, the function
he district court is a limited one. It must grant the application
enforcement ". . . if the inquiry is within the authority of the
cy, the demand is not too indefinite and the information sought is
onably relevant." U.S. v. Morton Salt, 338 U.S. 632, 652-653. See
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-218.[1/]

1/ Cf. F.C.C. v. Schreiber, 381 U.S. 279. There, the Federal Communications Commission issued a subpena duces tecum directing the president of a corporation to appear at a public hearing and produce certain documents. Upon his refusal to produce certain materials unless the Commission could assure him that the information contained therein would be held in confidence, the Commission filed a petition for enforcement of the subpena in a district court. The court enforced the subpena but directed that the testimony given and the documents produced be received in camera. This Court affirmed, holding that the district court had not abused its discretion in so conditioning the order. The Supreme Court, however, reversed and directed that the subpena be enforced without modification. The Court pointed out the district court's "limited judicial responsibility" in subpena enforcement proceedings and held that "the question for decision was whether the exercise of discretion by the commission /in ordering that non-public hearings be held only in specifically limited circumstances/ was within permissible limits, not whether the District Court's substituted judgment was reasonable" (381 U.S. at 291).

ing in the statutory or case law suggests that the district courts issue orders directing individuals to appear, produce evidence, or testimony before an administrative agency in the absence of an outding subpena, validly issued by that agency. Section 11(2) itself ers jurisdiction on the district courts only "in case of contumacy efusal to obey" a subpena issued pursuant to Section 11(1). In t, if there is no longer any subpena, the district court order "has urpose" (Cudahy Packing Co. v. N.L.R.B., supra) and is, accordingly,

To the extent that Flotill Products, Inc. v. F.T.C., 278 F. 50 (C.A. 9), cert. denied, 364 U.S. 920, may be interpreted as suging that a district court order enforcing an agency subpena is letely independent of the administrative proceeding giving rise to court action and retains its effectiveness even after the revocation he subpena, we respectfully submit that it is inconsistent with the eme Court's decisions in Oklahoma Press Publishing Co., supra; and C. v. Schreiber, supra. In any event, Flotill is distinguishable ts facts. There, the district court issued an order enforcing a ena issued pursuant to Section 9 of the Federal Trade Commission (15 U.S.C. 49), but narrowing the scope of one of its provisions. ppeal, this Court rejected the contention that the district court no power to issue an order "different in character" from the administrasubpena, holding that after the issuance of the court order, the der subpena issued by the hearing examiner was "superseded" and me "inoperative and irrelevant" (278 F. 2d at 852). This reasoning not, of course, provide any basis for the argument that revocation subpena by the body that originally issued it, and whose proings it is part of, is "irrelevant."

Nor would the points raised in appellees' answer to appellant's
on to vacate judgments[2] preclude a finding that the District Court
eedings are moot. They contend that the Board's revocation of the
ena was invalid because the General Counsel's request for special
ission to appeal from the Trial Examiner's ruling was not "filed
otly" and served on the other parties "immediately," as required by
ion 102.26 of the Board's Rules (29 C.F.R. 102.26). The record,
ver, shows that Wilmot announced his intention to seek special per-
ion to appeal from the Trial Examiner's ruling on Wednesday, October 4,
immediately after the motion to revoke the subpena was denied (R.
At the District Court hearing on the following day, he stated
the appeal had been undertaken (TR. 3). It is not disputed that
egraphic request for permission to appeal was in fact sent to the
later the same day. We submit that, in these circumstances, their
tion that the request was not filed "promptly" is frivolous. The
ntion that the request was invalid in any event because it was not
d upon appellees "immediately" is also without merit. As shown,
equest was made on the afternoon of October 5, 1967, a Thursday.
Union and the Company admit that they received copies of the telegram
gh the mail on October 9 and 10 respectively, the following Monday
uesday (answer to appellant's motion, p. 7).[3]

Moreover, appellees never objected to the Board that Wilmot's
st was untimely or that service upon them was inadequate. Although
lees now contend that this short interval resulted in sufficient

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ncorporated by reference into their brief (Br., p. 5 n. 2).

[3] The copies of the request for leave to appeal were mailed from the Board's Regional Office in Seattle, and were addressed to the Union's counsel in Seattle and the Company's counsel in Anchorage.

irness to invalidate the Board's subsequent action, they offer no
ence indicating that they were prejudiced in any way. In light of
fact that the Board did not act upon the request until October 27,
well over two weeks after the Union and the Company were served,
difficult to see how a claim of unfairness resulting from delay
ervice could be supported.

Similarly, there is no support for the argument that the Board
unfairly in granting Wilmot leave to appeal and, at the same time,
g on the merits of the appeal. The subpena (R. 7), the General
el's petition to revoke (R 8-9), an affidavit in support of the
ion (R. 10), and the Union's affidavit in opposition setting forth
ontentions in the matter (R. 11-15), were all included in the record
e the Board when it ruled on the appeal. Appellees do not suggest
further contentions would have been made or what additional evidence
have been presented if they had taken advantage of their opportunity
bmit an opposition to the appeal. In such circumstances, they can-
ow argue that they were prejudiced by the Board's action in making
ermination on the basis of the record before it.

II. NOTHING IN THE NATIONAL LABOR RELATIONS ACT OR THE ADMINISTRATIVE PROCEDURE ACT AUTHORIZES THE SUIT WHICH APPELLEES BROUGHT

The contention (Br., p. 9-23) that Section 11(2) of the Act
des a basis for appellees' action is completely frivolous. Appel-
oncede (Br., p. 10) that the language of that section, if "literally
ed," confers no jurisdiction on the district courts to enforce
subpenas upon the application of private litigants. They also
nize (Br., p. 7) that the courts have consistently refused to enter-
such suits. They contend, however, that the statutory language
d be "interpreted broadly" (Br., p. 17) to permit what it plainly
udes.

In support of this argument, appellees point to Section 1(b) e Act, in which Congress declared it to be the policy of the Act eate "orderly and peaceful procedures" for the prevention of unfair practices (29 U.S.C. 141). They contend that permitting private for subpena enforcement is consistent with congressional intent se it would "facilitate 'orderely' hearings by expediting the taking stimony" (Br., p. 13). We submit that, on the contrary, such an retation would facilitate the use of dilatory tactics to interfere he Board's processes. Proceedings before the Board's trial examiners be prolonged unnecessarily by the initiation of district court for the enforcement of burdensome, frivolous, or plainly irrelevant as.[4/] The circumstances of this case illustrate the potential for essary delay inherent in appellees' interpretation.

Appellees also rely (Br., p. 15) on Section 6(d) of the Administrative Procedure Act (5 U.S.C. 555(d)),[5/] which they contend must be n "pari materia" with Section 11(2). They argue that Congress'

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ection 11(1) of the Act (29 U.S.C. 161(1)) provides that

> The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application (emphasis added).

us, there are no limits placed upon the number of subpenas obtainable the type of evidence which might be demanded. Moreover, while the rty to whom the subpena is directed can file a petition to revoke der Section 11(1), there is nothing to prevent the party requesting e subpena from filing a suit in the district court before the Board kes its final ruling on the petition, as did the appellees here. . N.L.R.B. v. McLean, 47 LRRM 2498, 2499 (S.D.N.Y.).
t out in full on p. 15 of appellees' brief.

ure in Section 6(d) to specify which parties may institute subpena rcement proceedings "is a clear indication that Congress wanted no limitation or differentiation imposed" (Br., p. 16-17). We submit the more logical assumption is that Congress' silence on the point cates its desire to remain free to fashion subpena enforcement pro- res appropriate to the particular agency involved. Thus, Section), which was re-enacted without change at the time of the 1947 Taft- ley amendments (61 Stat. 136), one year after the tion of the Administrative Procedure Act, specifically limits district t jurisdiction to actions instituted by the Board. The statutes cited ppellees' brief (p. 14-15), on the other hand, are equally specific llowing any party to initiate such proceedings. As appellees admit, ress has indicated repeatedly that it is bound by "no uniform tice" (Br., p. 14) in drafting such provisions.[6/] Thus, the legisla- cited by appellees merely provides further support for the already ous conclusion that if Congress had contemplated actions such as this nacting Section 11(2), it would not have specifically limited the rict courts' jurisdiction to cases commenced "upon application by Board."

Section 3 of the Administrative Procedure Act (5 U.S.C. 552), appellants contend demonstrates a congressional policy favoring

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6/ For examples of provisions similar to the one involved here, see 15 U.S.C. 49, which specifies that in cases of disobedience to a subpena issued by the Federal Trade Commission, "the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence," and 15 U.S.C. 77v(b) which gives the district courts power to enforce subpenas issued by the Securities and Exchange Commission only "upon application by the Commission" (emphasis added).

road" interpretation of Section 11(2), is totally irrelevant. That
ion, as amended by the Public Information Act of 1966, requires only
an agency make available, upon proper request, copies of its opinions,
rs, and, with certain exceptions, other "identifiable records." In
event the agency refuses to comply, a suit to compel production of
improperly withheld records may be commenced in a district court
r subsection (a)(3). Nothing in the statute indicates that it was
nded to expand the jurisdiction of the district courts in subpena
rcement proceedings. Having failed to pursue the required steps
r that section, appellees are in no position to rely on an asserted
ong congressional policy in favor of disclosure of information in
possession of the government" (Br., p. 18) as a basis for otherwise
xistent district court power in an entirely unrelated proceeding.

Finally, appellees urge the Court to adopt their interpretation
ection 11(2) as a means of avoiding a constitutional issue -- i.e.,
ner denying private litigants the right to initiate subpena enforce-
proceedings, while granting that privilege to the Board, amounts
denial of "equal protection of the law" to the extent that this guarantee
neld to be incorporated into the "due process" clause of the Fifth
dment in Bolling v. Sharpe, 347 U.S. 497. It is clear, however,
their constitutional challenge has no basis. As the Supreme Court
rved long ago, the equal protection clause does not secure to all
gants "the benefit of the same laws and the same remedies." Brown
ew Jersey, 175 U.S. 172, 175. A denial of equal protection is
olished only upon a showing that someone ". . . comparably situated
been treated differently. . ." National Union of Marine Cooks and
ards v. Arnold, 348 U.S. 37, 41. It does not require extended argu-
to show that the Board, as a federal administrative agency charged

enforcement of the National Labor Relations Act, and appellees, as ate litigants before the Board, are not "comparably situated." Thus, distinction drawn by Congress in Section 11(2) is not "wholly irrele- to achievement of /its/ objectives" (Kotch v. Board of River Port Commissioners, 330 U.S. 552, 556) and, accordingly, appellees may claim a denial of equal protection.[7/]

III. 28 U.S.C. 1337 IS INAPPLICABLE TO THIS CASE

Appellees concede (Br., p. 24-25) that the review procedures ded by Section 10(e) and (f) of the Act are exclusive, precluding district courts' assertion of their general equity powers under 28 . 1337, if they are "adequate to protect statutory and constitutional s" (Br., p. 24). As shown in our main brief (p. 12-14), the pro- ns of the Act are clearly adequate: the Board's order cannot become tive before appellees' contentions with regard to the subpena, which have been preserved by a simple offer of proof, are reviewed by propriate court of appeals. The argument that the time and expense red to pursue the statutory avenue of review renders it inadequate of course, been rejected by the Supreme Court. Myers v. Bethlehem building Corp., 303 U.S. 41, 50-52; Boire v. Greyhound Corp., 376 473, 477-478.[8/]

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n Republic Pictures Corp. v. Kappler, 151 F. 2d 543 (C.A. 8), cited y appellees (Br., p. 21), the court held that an Iowa statute im- osing a six-month limitations period for the bringing of actions rising under federal law, while allowing a longer period for "similar ctions arising or based upon other than federal laws" (151 F. 2d at 47), resulted in a denial of equal protection to those asserting ederal claims. The court was quite specific, however, in holding id. at 547) that only "litigants similarly situated may appeal to he courts for relief under like conditions and without discrimina- ion" (emphasis added).

lso incorrect is the contention (Br., pp. 9-10) that appellees were ntitled to assume that requesting the Board to apply for enforcement f the subpena would have been useless. Cf. Meekins, Inc. v. Boire, 20 F. 2d 445, 449-450 (C.A. 5).

The assertion (Br., p. 26) that Section 11(2) was not intended ongress to provide the exclusive remedy for enforcement of subpenas lso erroneous. N.L.R.B. v. British Auto Parts, Inc., 266 F. Supp. (C.D. Calif.), which appellees cite (Br., p. 26), is inapplicable. hat case, the court held that the Board could obtain an order directing mployer to produce a list of the names and addresses of his employees use in a representation proceeding under Section 9 of the Act) by rt to either the procedures of Section 11(2) or a mandatory injunction r 28 U.S.C. 1337. However, the opinion makes clear that the injunction ot to be considered an alternate method of enforcing a subpena. On contrary, the court held that even if the subpena be held unenforce- on the ground that the list is not "evidence" under Section 11(1) he Act, an injunction could issue to enforce the Board election rule iring the list.[9/] Here, appellees do not assert that they are re- ing the enforcement of a Board rule; they simply seek enforcement subpena. If, as we have shown, the exclusive provisions of Section) preclude their action, it is clear that the District Court had no r to enforce the subpena under 28 U.S.C. 1337. (See cases cited in ain brief, p. 15.)

IV. THE GENERAL COUNSEL IS AN INDISPENSABLE PARTY

Contrary to appellees' assertion (Br., p. 32), the Supreme 's decision in Williams v. Fanning, 332 U.S. 490, supports the con- ion that, in any event, the General Counsel was an indispensable to this action. In that case, the Postmaster General ordered a postmaster to return to the senders any mail directed to plaintiffs

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The rule was first set forth in Excelsior Underwear, Inc., 156 NLRB 1236.

to refuse payment of any money order drawn to their order. The ntiffs brought suit to enjoin the postmaster from carrying out the r. The Supreme Court, reversing the court of appeals, ruled that r action could not be dismissed for failing to join the Postmaster ral. In reaching this conclusion, it recognized the principle that superior officer is an indispensable party if the decree granting relief sought will require him to take action, either by exercising ctly a power lodged in him or by having a subordinate exercise it him" (332 U.S. at 493). The Court found, however, that the relief nt by the plaintiffs would expend itself on the subordinate official, postmaster, and would "not require the Postmaster General to do a e thing" because "no concurrence on his part /was/ necessary to make l" the actions required by the postmaster, i.e., the payment of the orders and the release of plaintiff's mail, which were plainly n his normal authority. The situation here is quite different. Board's Rules and Regulations specifically provide that Board em- es shall not testify or produce documents from the Board's files ut "written consent" from the Board or the General Counsel. Thus, elief sought will require the General Counsel to take affirmative n. If the subpena is enforced, he would be obligated to issue a en authorization for the release of documents from his files and ppearance of one of his employees. Such action, of course, would wise be completely outside Wilmot's authority as a Board employee. his reason, the District Court proceedings should have been dismis- or failure to join the General Counsel as an indispensable party.

V. THE SUBPENA WAS UNENFORCEABLE IN ANY EVENT

As shown in the Intervenor's brief (p. 16-19(, the subpena was nforceable in any event because (1) as appellees admit (Br., p. 3), egional Director refused to approve the settlement agreement they and it is accordingly ineffective and irrelevant to the proceedings; ppellees already have in their possession an original copy of the ment; and (3) a subpena duces tecum cannot be used to compel a wit- to compile a list of telephone calls, or any other materials, not istence at the time the subpena is served.

CONCLUSION

Since, under any of the above theories, the District Court enforcing the subpena was erroneous and must be vacated, any civil mpt proceedings arising out of disobedience of the order must also cated, even if it should be found that the District Court did have diction over the action. (See cases cited on p. 10 of our main .)

For the foregoing reasons, as well as those stated in our ng brief, a decree should issue reversing the judgments below, ing the orders of the District Court, and remanding the case with uctions to dismiss the petition.

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1968. National Labor Relations Board.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES FRANKLIN DUNN, Appellant, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS, CALIFORNIA ADULT AUTHORITY, et al., and L. S. NELSON, Warden, Appellees.	No. 22301

APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS

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APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code, section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Appellant was convicted on July 3, 1959, in the Superior Court of the County of Alameda, upon his plea of guilty, of one count of possession of a narcotic, in violation of California Health and Safety Code section 11500.

He was sentenced to state prison for the term prescribed by law. People v. James Franklin Dunn, No. 30572 (CT 66). He did not appeal this judgment. Appellant filed an application for a writ of habeas corpus in the Superior Court of Tuolumne County on May 24, 1966. An order to show cause was issued on June 2, 1966, and a return to the order to show cause was filed by the respondents therein named on June 17, 1966. On June 28, 1966, the writ was denied in an unpublished opinion. Appellant's application for a writ of habeas corpus in the Court of Appeal, Fifth Appellant District, was filed on September 6, 1966, and denied on September 7, 1966. Appellant's application for a writ of habeas corpus in the Supreme Court of California was filed on October 13, 1966, and denied on November 16, 1966. These applications raised the same issues now before this Court. (CT 58).

B. Proceedings in the Federal Courts

On November 28, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1). On December 16, 1966, appellant filed a document entitled "Motion for Leave to Add Supplemental Facts and Authorities with Exhibits" (CT 20). On February 9, 1967, the Honorable Robert F. Peckham entered an order denying appellant's petition (CT 46). On February 16, 1967, appellant filed a Motion for Rehearing, addressed to Judge Peckham (CT 48). On March 13, 1967, Judge Peckham issued an order requiring

appellees to show cause why a writ of habeas corpus should not be issued (CT 56). Appellees responded with Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus, filed March 21, 1967 (CT 57). A document entitled "Traverse Brief" was filed by appellant on March 28, 1967 (CT 74). A hearing was held on March 30, 1967, and on April 17, 1967, Judge Peckham entered an order denying the petition (CT 86). On April 27, 1967, appellant filed motions for certificate of probable cause to appeal, for leave to appeal in forma pauperis, and for appointment of counsel (CT 89). Judge Peckham denied these motions in an order filed May 17, 1967 (CT 101). On May 31, 1967, appellant duly filed a motion for reconsideration of his motion for a certificate of probable cause to appeal (CT 103). And on September 13, 1967, appellant filed a document entitled "Supplement to Motion for Rehearing for Certificate of Probable Cause to Appeal" (CT 111). Persistence was again rewarded, and on September 28, 1967, Judge Peckham issued an order granting a certificate of probable cause (CT 119). Notice of Appeal and a Motion for Appointment of Counsel were filed on October 6, 1967 (CT 120, 124).

STATEMENT OF THE FACTS

Appellant was paroled on November 7, 1960, after having served 16 months of his sentence. On December 20, 1961, his parole was suspended and he was returned to prison. He was paroled again on July 20, 1962 (CT 72). All went well until May 13, 1963, when appellant disclosed to

his therapist, a Mr. Jensen, that he had been taking heavy doses of Dexedrine pills. A violation report was submitted to the Adult Authority, which ordered appellant continued on parole (CT 68).

According to a subsequent report to the Adult Authority, agents of the Bureau of Narcotic Enforcement received information that appellant was residing at a certain address with one Myrna Woods, also known as Myrna Lou Goodrow, and engaged in large-scale marijuana traffic. A search warrant was obtained for the residence and appellant's person. Officers went to the residence, where they saw appellant and Miss Woods in her car. After the officers had identified themselves and announced that they had a search warrant, they observed Miss Woods reach into her purse and throw something out of the right front vent window. A search of the area beneath the window disclosed four white marijuana cigarettes and 16 white tablets. A search of appellant's person yielded six white tablets from his pocket. One marijuana cigarette and seven white tablets were found on the seat of the car. (CT 68-69).

A search of appellant's apartment disclosed a number of smoking pipes, a small blue box containing suspected marijuana, a partially-smoked marijuana cigarette, two kilos of marijuana, and a package of cigarette papers. Marijuana debris was found in a new work shirt in the bedroom closet. (CT 69).

Appellant and Miss Woods were charged with violating California Health and Safety Code section 11530 (possession of marijuana). The violation report states that the two appeared in court, and that Miss Woods (Miss Goodrow), pleaded guilty and exonerated appellant of any knowledge of the marijuana found in their apartment. (CT 69). Here the violation report (appellees' exhibit below) differs from one of appellant's exhibits below. At CT 34-37, appellant sets out a purported true copy of a transcript of the proceedings in connection with Miss Goodrow's plea. While they show that she made a judicial confession of guilt, they are barren of any reference to appellant or any intimation that he did not jointly possess the marijuana with her.

At any rate, the District Attorney successfully moved that the charge against appellant be dismissed (CT 37, 69-70).

A violation report was submitted to the Adult Authority, charging appellant with having violated parole by using a dangerous drug, Dexedrine (based on appellant's disclosure to his therapist of his use of the drug on May 13, 1963), and by possessing marijuana. (CT 68). Appellant's parole was cancelled. At a hearing before the Adult Authority on February 10, 1964, appellant pleaded guilty to count 1 (the dexedrine charge) and not guilty to count 2 (the marijuana charge). He was found guilty of count 2, and his parole revoked (CT 73).

APPELLANT'S CONTENTIONS

Appellant contends that his parole was improperly revoked because:

(1) The Adult Authority, having once declined to revoke his parole for using Dexedrine, could not properly use the same violation of parole as the basis for revocation of parole.

(2) The dismissal of the charges against him by the Municipal Court amounted to an acquittal on the marijuana charge.

(3) There was not sufficient evidence of his guilt of the marijuana charge.

(4) He was denied due process by not being afforded the right to counsel and to confront witnesses at his revocation hearing. (This contention appears to have been abandoned on appeal, as we cannot find it in appellant's brief.)

SUMMARY OF APPELLEES' ARGUMENT

I. The Adult Authority's decision to revoke parole may properly be rested either on appellant's admitted use of Dexedrine, or his possession of marijuana, as found by the Adult Authority, or both.

II. Appellant had no constitutional right to appointment of counsel or confrontation of witnesses at his parole revocation hearing.

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ARGUMENT

I

THE ADULT AUTHORITY'S DECISION TO REVOKE PAROLE MAY PROPERLY BE RESTED EITHER ON APPELLANT'S ADMITTED USE OF DEXEDRINE, OR HIS POSSESSION OF MARIJUANA, AS FOUND BY THE ADULT AUTHORITY, OR BOTH

With respect to appellant's claim that his parole revocation was unconstitutional because based on insufficient evidence, the Court below made the following observations:

> "A prisoner has no constitutional right to parole. Escoe v. Zerbst, 295 U.S. 490, 55 Supt. Ct. 818, 79 L. Ed. 1566 (1935). Thus, the scope of inquiry into state parole revocation by a federal court in Habeas Corpus proceeding is very narrow, and is limited to looking for denial of equal protection or denial of the minimum standards of due process. Thus, absent a showing that the Adult Authority has acted arbitrarily or capriciously, or that petitioner has been treated differently than others similarly situated, no federal question is presented.
>
> "The main thrust of petitioner's attack is that the Adult Authority had so little evidence on which to base the revocation of his parole, that their action was entirely arbitrary and therefore violated his rights of due process. As stated above, the scope of review of the Adult Authority's

action is extremely narrow. This court need only find that some evidence of violation of parole conditions did exist." (CT 86-87).

It is our position that the above statement of the law represents that view most favorable to appellant. We would establish, in a proper case, that alleged insufficiency of evidence supporting parole revocation by state agencies simply does not present a federal question. We have found no authority that it does, and only one case holding that, in extreme cases, the sufficiency of evidence supporting parole revocation by a federal parole board is subject to judicial review. See Hyser v. Reed, 318 F.2d 225, 240 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963). However, we may assume without conceding that the Constitution forbids state parole revocation which is wholly arbitrary, for appellant's parole revocation was manifestly justified by the evidence presented to the Adult Authority.

We should like to treat first a ground of revocation the merits of which the District Court did not reach: the plea of guilty to a charge of using Dexedrine (CT 87). Appellant's claim is that this charge could not properly be used as a basis of revocation, since the Adult Authority had earlier permitted appellant to continue on parole. He claimed below a denial of due process in that the charge "was held over the petitioner's head to be used at some indefinite and/or remote time . . . ." (CT 48A).

We have found no authority that would prevent the Adult Authority from changing its mind on the question of whether an admitted parole violation should result in revocation. Appellant's heavy reliance on United States ex rel. Howard v. Ragen, 59 F. Supp. 374 (N.D. Ill. 1945) is misplaced. That case held only that a state may not revoke parole after expiration of the period for which the parolee was originally sentenced, when the state had expressly refused to do so during pendency of the original term. All of the elaborate dicta quoted by petitioner were directed to this basic proposition. Furthermore, the Howard case was expressly overruled in United States ex rel. Meiner v. Ragen, 199 F.2d 798, 800 (7th Cir. 1952). While the District Court did not find it necessary to reach the merits of appellant's claim in connection with the Dexedrine charge, we submit that the claim is without substance, and that the Adult Authority could constitutionally redetermine the question of whether appellant's admitted use of Dexedrine should result in revocation of his parole. Moreover, by pleading guilty to the Dexedrine charge, appellant waived any claim that it was improperly used as a basis for parole revocation.

Appellant still claims that he was innocent of count 2--possession of marijuana. The District Court, however, found

> "that the evidence before the Adult Authority with regard to the charge of possession of

marijuana was more than sufficient to be the basis for them to make a rational decision finding a violation of parole conditions by petitioner." (CT 87).

This finding is plainly supported by the evidence, which showed that large quantities of marijuana had been found throughout appellant's residence. This evidence has been detailed above, and we will not repeat it here. Although the Adult Authority was under the impression, apparently incorrect, that appellant's lady friend had testified as to his innocence, that testimony was evidently not accepted as true. We submit that the Adult Authority was no more bound by this alleged testimony than a jury would have been. Just as a jury could have disregarded the testimony and convicted appellant, so could the Adult Authority disregard it and find that appellant had violated his parole. The evidence before the Adult Authority was far stronger than that supporting the parole revocation upheld by this Court in Williams v. Dunbar, 377 F.2d 505 (9th Cir.), cert. denied, 389 U.S. 866 (1967).

Appellant claims that the dismissal of criminal charges against him by the District Attorney amounted to an acquittal. Under California law, an acquittal of criminal charges bars the Adult Authority from revoking parole solely on the basis of the same charges. In re Hall, 63 Cal.2d 115, 403 P.2d 389, 45 Cal. Rptr. 133 (1965). Federal law is contra. See Fox v. Stanford,

123 F.2d 334 (5th Cir. 1941). If appellant is contending that he was treated at variance with state law, he is not aided. As this Court has stated, "Due process questions do not arise merely because appellant has been treated at variance with state laws." Draper v. Rhay, 315 F.2d 193, 198 (9th Cir.), cert. denied, 375 U.S. 915 (1963). Accord, Beck v. Washington, 369 U.S. 541, 554-55 (1962). And at any rate, appellant was not treated at variance with state laws, for he was not "acquitted" of the criminal charges. The law of California, as applied to appellant's case, has been interpreted by the Honorable Ross A. Carkeet, Judge of the Superior Court of Tuolumne County, in an opinion denying petitioner's petition for a writ of habeas corpus (case No. 10544 in the files of that court). Judge Carkeet therein stated:

> "The Court finds that petitioner was not acquitted of said felony charge, [possession of marijuana] but same was dismissed at the preliminary hearing, and that the Adult Authority was not precluded from receiving evidence in support of the charges or making a finding of the correctness of the charge, if such evidence existed irrespective of the dismissal."

After quoting from Hall, Judge Carkeet continued:

> "[B]ut here there was neither conviction nor acquittal, and the Adult Authority had

jurisdiction to conduct its own hearing and make its own findings."

Again to adopt the findings of the District Court,

> "The dismissal of the charges on motion of the District Attorney falls short of an 'exoneration' of petitioner. It is merely an exercise of prosecutorial discretion which has no probative value." (CT 88).

This finding is, of course, correct. Whether the dismissal of the charges was the result of the District Attorney's appraisal of the merits of the case against appellant, or whether the District Attorney merely took pity on appellant and elected to place him in the hands of the Adult Authority, rather than subject him to a prosecution for a second narcotics offense with its heavy mandatory penalties, the dismissal could by no means be equated with either an "acquittal" or an "exoneration."

> "But even an acquittal of the charge would not have presented a constitutional obstacle to the action of the Adult Authority in using the presence of the marijuana in Petitioner's residence as a basis for parole revocation." (CT 88).

We might note that even if the evidence of appellant's possession of marijuana could somehow be considered insufficient, that fact would not render

revocation of his parole improper. It must be remembered that he had admitted using Dexedrine. And if some novel theory of double jeopardy could be raised as a bar to revocation of parole on the sole basis of the Dexedrine charge, since the Adult Authority had once declined to revoke parole for this violation, we submit that appellant's admitted use of Dexedrine, plus the unquestioned fact that he had not been able to avoid close contact with someone possessing large quantities of marijuana, show a pattern of drug involvement that would justify parole revocation.

II

APPELLANT HAD NO CONSTITUTIONAL RIGHT TO APPOINTMENT OF COUNSEL OR CONFRONTATION OF WITNESSES AT HIS PAROLE REVOCATION HEARING

Appellant's assertion, if he has not abandoned it, that he was constitutionally entitled at his parole revocation hearing to be represented by counsel and to confront witnesses against him, is shortly disposed of. He has no such rights. Williams v. Dunbar, 377 F.2d 505 (9th Cir.), cert. denied, 389 U.S. 866 (1967). See also Eason v. Dickson, No. 20,303 (9th Cir., January 30, 1968), p. 4 & n.3.

CONCLUSION

Before closing, we think in order a discussion of the rationale behind the persistent refusal of courts to review parole revocations. The philosophy of parole is that a duly convicted prisoner who has not completed service of his sentence may be returned to society, if at

all, only under close supervision. The parole board must be free to return a parolee to prison summarily when he has shown signs of being unable to adjust to society and avoid antisocial acts. If parole boards were subject to any significant restraint upon their power of revocation, the parole experiment would be in great danger of failure, and society would have no choice but to abandon it, thereby sacrificing a system which has been legislatively determined to be greatly advantageous to society and the prisoner alike. We adopt the words of this Court:

> "If the appellant's contentions were valid, the use by the states and the federal government of the beneficent practice of releasing prisoners from the confines of the prison to the custody and supervision of parole officers would be impracticable and would have to be abandoned. The release from the confines of the prison would become substantially equivalent to the discharge of the prisoner from his sentence, and if, as in the instant case, the parolee denied either the fact of the violation or the legal sufficiency of the act alleged to be a violation of his parole, the prison authorities would be required, in a hearing before a judge, with all the concomitants of a non-jury criminal trial, to justify their resumption of in-prison

custody of their prisoner." Williams v. Dunbar, supra at 506.

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus be affirmed.

DATED: April 10, 1968.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: April 10, 1968

GEORGE R. NOCK
Deputy Attorney General
of the State of California

No. 22,302

IN THE

United States Court of Appeals
For the Ninth Circuit

LOIS COCHRAN,
Appellant,

vs.

MARIO DELIZIO,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S REPLY BRIEF

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No. 22,302

IN THE

United States Court of Appeals

For the Ninth Circuit

LOIS COCHRAN,

Appellant,

vs.

MARIO DELIZIO,

Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S REPLY BRIEF

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT ANY NEGLIGENCE OF PLAINTIFF'S HUSBAND AS DRIVER OF THE CAR WAS IMPUTABLE TO PLAINTIFF.

Appellee erroneously states, without citation of authority, that the statute involved herein "is not a judicial (sic. legislative) expression" of a rule of law known as the "Family Purpose Doctrine". Appellant submits that the statute in question clearly is the embodiment of a typical "family purpose" rule, as is indicated by the very title itself: "Liability of motor vehicle owner for negligent operation by immediate member of family." The obvious and sole intent of the statute was to provide an injured plaintiff with a financially responsible defendant, and not to defeat the right of recovery of an innocent plaintiff.

It is clear, not only from the language of the statute itself, but from the legislative intent, that the statute was enacted solely for the purposes of *imposing liability*. Statutes of Nevada 1956-1957 describe the bill in question as follows:

> "AN ACT to amend Chapter 41 of NRS relating to special actions and proceedings by creating new provisions *imposing liability* upon the owner of a motor vehicle for negligent operation thereof by immediate member of family." (emphasis added)

Appellee states on page 18 of his Answering Brief that the Nevada Legislature must be deemed to have been aware of the California statute when it enacted NRS 41.440. This argument is absurd and self-defeating because if the Nevada Legislature had wished to enact such a statute it merely would have adopted it verbatim. A comparison of the two statutes shows that they are entirely different and obviously enacted for manifestly different purposes and reasons. The California "permissive use" statute applies to *any* permissive user while the Nevada statute is specifically limited to *immediate members of the family*. For these reasons alone, the California decisions cited on pages 11 and 12 of Appellee's Answering Brief are totally inapplicable.

Appellee also argues, equally illogically, that the Nevada Legislature should be deemed to have been aware of the California decisions construing the California statute. However, it is more natural that the Nevada Legislature was aware of the Nevada Supreme Court decision of *F. & W. Construction Co. v. Boyd*, 60 Nev. 117, 102 P. 2d 627 (1940), cited at pages 25 and 26 of Appellant's Opening Brief, holding that contributory negligence of a husband cannot be imputed to a wife in Nevada.

The overwhelming majority of the jurisdictions which have considered the problem have *rejected* the imputation of contributory negligence based solely on the owner-per-

mittee relationship, and the doctrine has been severely criticized by virtually all leading commentators. See 17 *Stanford Law Review* 55 (1964).

Appellant respectfully submits that NRS 41.440 is totally different, both in language and intent, from the California statute, and to impose the strained construction of *Milgate v. Wraith*, 19 Cal.2d 297, 121 P. 2d 10 (1942), decided 26 years ago, upon citizens of the State of Nevada, would be completely unwarranted and a gross miscarriage of justice.

It is noteworthy that Appellee concedes this instruction affected a substantial right of Appellant. The instruction was erroneous and thus dictates reversal of the judgment and retrial.

I. THE COURT'S INSTRUCTIONS ON THE DEFINITION AND SUBJECT OF CONTRIBUTORY NEGLIGENCE, ESPECIALLY WITH REFERENCE TO "SOME DEGREE" OF CONTRIBUTORY NEGLIGENCE WERE PREJUDICIAL ERROR.

A. Appellant's Exceptions and Objections to the Court's Instructions Were Legally Sufficient and In Compliance With FRCP 51; the Instructions Were Prejudicially Erroneous and Violated Appellant's Substantial Rights Within the Meaning and Provisions of FRCP 61.

Initially it should be noted that Appellee apparently concedes the various instructions to be erroneous, and relies upon a purely formalistic and hyper-technical construction of FRCP 51 and 61 in a vain attempt to rationalize the prejudicially erroneous instructions. The vast majority of his Brief is devoted to these rules, and Appellant respectfully submits that such a slanted and overemphasized effort to utilize their provisions demonstrates Appellee's total inability to distinguish the applicability and validity of Appellant's case authorities which dictate

a reversal of the judgment and remand of this case for retrial.

In view of Appellee's almost total reliance upon Rules 51 and 61, Appellant should like to respectfully point out that Circuit Court of Appeal decisions for years have declared that FRCP 51 was never intended to stultify form over substance, that it is not important in what *form* the objection is made or even that formal objection be made at all, so long as counsel states for the record objection to the particular instruction in such a manner that the trial judge is aware it is being challenged and is informed of possible errors so that he is given the opportunity of determining whether it should be corrected.

The following authorities pertaining to Rule 51 clearly demonstrate that Appellant fully and completely complied with FRCP 51.

In *Greyhound Corporation v. Blakley,* 262 F.2d 401, 408 (9 Cir. 1958) the Court declared:

> "The defendant's exception drew the trial court's attention to the contention that the instruction as to res ipsa loqutur should not be given . . . We believe that there was a sufficient compliance with Rule 51. Broderick v. Harvey, 1 Cir., 1968, 252 F.2d 274; Thomas v. Union Railway Co., 6 Cir. 1954, 216 F.2d 18."

In *Di Bari v. Fish Transport Co., Inc.,* 275 F.2d 280, 281 (2 Cir. 1960) a verdict for defendants was reversed over Appellee's contention that plaintiff had failed to comply with Rule 51. The Court held:

> "At the conclusion of the charge, plaintiff's counsel took exception 'to that portion of your Honor's charge wherein you stated that if the jury found the plaintiff Di Bari guilty of contributory negligence that the other plaintiffs could not recover.' The court overruled the exception and gave no further charge.

> We think this exception was sufficiently explicit to comply with Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A."

Moreau v. Pennsylvania R. Co., 166 F.2d 543, 545 (3 Cir. 1948) is very similar factually to the present case. Plaintiff excepted to an instruction, after which a brief discussion ensued, but the error was not corrected and plaintiff did not object. The court held that plaintiff properly preserved the error, and that "he is not required to indulge in reiterative insistence in order to preserve his client's rights."

In *Green v. Reading Co.,* 183 F. 2d 716, 719 (3 Cir. 1950) appellant made no objection whatsoever to the erroneous instruction, and all he did was submit an erroneous instruction himself on the issue in question. Despite the fact that no objection was made to the instruction given, and that appellant's requested and refused instruction was itself erroneous, the court held the requested instruction was "sufficiently specific to direct the attention of the court below to the issue and to the law, that it was adequate to indicate the error of the charge, . . . that the issue here involved was fairly and timely within the cognizance of the trial court, and that the substantive spirit of Rule 51 is satisfied."

In *Pierro v. Carnegie-Illinois Steel Corp.,* 186 F.2d 75 (3 Cir. 1950) the court held that although plaintiff's request to charge was erroneous, it was, together with the exceptions, *unmistakable in its direction and was sufficient to apprise the court of the issue he sought to raise.*

Appellee, in the first paragraph on page 24 of his Answering Brief, cites five cases, *all of which support our position and are favorable to Appellant. Sweeny v. United Features Syndicate, Inc.,* 129 F.2d 904 (2 Cir. 1942) holds, although plaintiff took no formal exception

to the court's refusal to give an instruction, that Rule 51 did not preclude the appellate court's consideration of the assigned error, where it appeared there was a discussion of the point raised which adequately informed the trial court as to what plaintiff contended was the law, and entry of a formal exception thereafter would have been a mere technicality. Likewise, *Evansville Container Corp. v. McDonald,* 132 F.2d 80 (6 Cir. 1942), after reciting the general rule, held that the objections *were sufficient* and in compliance with FRCP 51.

In *Williams v. Powers,* 135 F.2d 153, 155, 156 (6 Cir. 1943), the *sole objection by Appellant's counsel was: "I desire an exception, however, to Section 12603 of the General Code."* After discussing Rule 51, the court held: "In our opinion we should consider the objection of appellant to the instruction given."

Alcaro v. Jean Jordeau, Inc., 138 F.2d 767, 771 (3 Cir. 1943), was a case in which *counsel for appellant had merely asked the trial court for an exception to the portion of the charge regarding contributory negligence, which objection was held to be sufficient.* The court declared:

> "There is no good reason for applying the rule (Rule 51) so indiscriminately as to prevent counsel from pointing out on appeal matter which he did endeavor to identify to the trial court and which he had reason to believe the court fully apprehended when granting an exception."

Finally, in *Swiderski v. Moodenbaugh,* 143 F.2d 212 (9 Cir. 1944), appellant *orally* submitted an instruction, whereas Rule 51 requires written requests. Yet the Ninth Circuit held that plaintiff was not precluded from assigning and urging error thereon on appeal.

Appellee cites six additional cases in his Answering Brief, none of which is in point. In *Jack v. Craighead*

Rice Milling Co., 167 F.2d 96 (8 Cir. 1948) cert. den. 334 U.S. 829, 68 S.Ct. 1340, 92 L. Ed. 1756 (1948) the only record made by defendants was: "Both defendants except to the giving of said instruction." *Hanson v. St. Joseph Fuel Oil and Manufacturing Co.*, 181 F.2d 880 (8 Cir. 1950) states the general rules with respect to Rule 51, then points out that appellant made no objection whatsoever to the instructions with respect to the assigned error, and merely excepted to the refusal to give certain instructions, without any reasons given therefor whatsoever. *Fritz v. Pennsylvania R. Co.*, 185 F.2d 31 (7 Cir. 1950), involved a defendant who failed to specifically object to the instruction which he later challenged on appeal. It is of no assistance in the present case. In *Hoag v. City of Detroit*, 185 F.2d 764, 766 (6 Cir. 1950), appellant raised certain points with respect to the burden of proof, but the court simply observed: "No requests to *charge* on these points were addressed to the trial court". (emphasis added) Likewise, in *Garland v. Lane-Wells Co.*, 185 F.2d 857 (5 Cir. 1951), there was no objection *whatsoever* at the time of trial. Finally, in *Biggans v. Hajoca Corp.*, 185 F.2d 982 (3 Cir. 1950), appellant apparently merely made a general exception to a portion of an instruction and stated no grounds therefor. None of the above cases is of any assistance to Appellee in this respect.

The record clearly establishes that Appellant's counsel specifically objected to the instructions in question, stated the grounds of objection, and called to the attention of the trial court the precise issues of law involved. The trial court was made fully aware of plaintiff's vehemently expressed objections. The above authorities, applicable to specifications of Errors II, III, IV and V, vividly demonstrate that Appellant has fully complied with the requirements of Rule 51 and she necessarily is entitled to have all of the legal issues presented to the trial court and raised on this appeal decided on the merits by this Court.

Any other result would represent an emasculation of the purposes and meaning of F.R.C.P. 51.

B. The Definition of Contributory Negligence is Erroneous as a Matter of Law and is Contrary to the Law of the State of Nevada.

The colloquy between Court and counsel set forth on pages 21 and 22 of Appellee's Answering Brief makes it demonstrably clear that, after the trial court inquired of Appellant's counsel as to his position with respect to the *remaining* part of Instruction No. 73.21, objection was being made to *any and all parts of the instruction* where the word "some" appeared. It is preposterous to conclude that Appellee could obviate this precise exception and objection to such a critical definition of contributory negligence under any intelligent reading of the provisions of F.R.C.P. 51.

Appellee fails to cite a single case concerning the merits of the issue and cannot distinguish the sound authorities cited by Appellant. It is respectfully submitted the instruction was erroneous and the giving thereof was prejudicial error.

C. The Contributory Negligence Instruction Containing the Phrase "Some Degree" was Prejudicially Erroneous.

The record on this appeal and the detailed objections contained in Appellant's Specification of Errors in her Opening Brief demonstrates the trial court was fully apprised of the nature of the prejudicial errors urged by Appellant in the contributory negligence instruction.

Again it should be noted Appellee is totally unable to distinguish any of the authorities cited by Appellant in her Opening Brief sustaining the prejudicial effect of the instruction. Appellee cites but four cases to justify the giving of this patently erroneous instruction, none of which is in point. The instruction involved in *Freeman*

v. Churchill, 30 Cal.2d 453, 183 P.2d 4 (1947), was concerned with cautioning the jury not to *compare* the negligence of plaintiff and defendant and was obviously different from the instruction given in the instant case. In *Polk v. Los Angeles*, 26 Cal.2d 519, 159 P.2d 931 (1945), the instruction differed markedly from the one given in the present case and is not in point. *Warren v. P.I.E. Co.*, 183 C.A.2d 155, 6 Cal. Rptr. 824 (1960) is not applicable because the erroneous portion of the instruction was never attacked or even referred to by Appellant. Thus, the trial and appellate courts were not required to, and did not, discuss the particular prejudicial error arising in that instruction. Finally, *Koch v. Denver*, 24 Colo. App. 406, 133 Pac. 1119 (1913), is totally distinguishable factually from the present case and the instruction involved therein is completely different. Further, the opinion is primarily concerned with a discussion of the doctrine of comparative negligence and is not in point.

D. The Reference in Defendant's Argument to "One Percent of the Proximate Causes" on the Part of Mr. Cochran Was Prejudicial Misconduct and Reversible Error.

A casual reading of counsel for Appellee's argument to the jury reveals the grossly prejudicial impact it must have had upon the jury. The record shows Appellant's objections to Appellee's argument was not, as claimed in the Answering Brief, limited to omission of the word "proximate". It was aimed directly at the "time-honored" defense argument and use of the circle and the "one percent" argument, including the use of the words contributory negligence, in "some" degree, "however slight."

The objection clearly was sufficient. See *Kentucky Trust Company v. Glenn*, 217 F.2d 462 (6 Cir. 1954), where the court held that the error urged on appeal was preserved by appellant, who called the trial court's attention to the

error during the *final argument* in such a manner as to advise the court of the question of law involved. Manifestly, Appellant's counsel in the principal case could not be expected to stand before the jury and complain in a detailed manner with great delineation as to all of the prejudicial effects that such jury argument had upon Plaintiff's case. Such a required procedure would defy common sense, as well as sound judicial procedure.

It must be reiterated that Appellee has cited no legal authority whatsoever in response to the cases supporting Appellant's objections and exceptions, and makes no attempt to distinguish the cases cited by Appellant.

Finally, on page 27 and 28 of his Brief, Appellee states the errors were "harmless". He ignores the numerous cases cited by Appellant holding such errors were prejudicial, requiring a reversal of this judgment and remand for new trial. The instructions pertaining to contributory negligence and the use thereof by Appellee in closing argument demonstrates beyond any doubt their patent unfairness and prejudiciality to plaintiff. Her "substantial rights" definitely were affected.

III. THE TRIAL COURT'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE OF PLAINTIFF AND THE IMPUTATION OF HER HUSBAND'S ALLEGED NEGLIGENCE AS DRIVER OF THE CAR PREJUDICIALLY ACCENTUATED THE DUTY OF PLAINTIFF AND MINIMIZED THE DUTY OF DEFENDANT, WERE PREJUDICIALLY CUMULATIVE, UNBALANCED, REPETITIOUS AND GIVEN IN ERRONEOUS ORDER PRIOR TO INSTRUCTIONS ON DEFENDANT'S DUTIES OF CARE REFERABLE TO DEFENDANT'S CONDUCT AND HAD A PREJUDICIAL INFLUENCE AND IMPACT UPON THE JURY.

In answer to the unsupported statement of Appellee, the case of *Howard v. Cincinnati Sheet Metal & Roofing Co.,* 234 F.2d 233, 235, 237 (7 Cir. 1956) is directly in

point because, as in the present case, the repetitious instructions given in a simple negligence case leaned heavily in favor of the contentions of the Defendant. The Court stated: "Plaintiff asserts as error that in the voluminous and repetitious instructions undue prominence and emphasis were given to the defendant's theory. After carefully considering the lengthy instructions, we conclude that prejudicial error occurred, and the plaintiff is entitled to a new trial."

In the *Howard* case, as in the present case, the Defendant raised the issue of compliance with Rule 51. which was summarily disposed of by the Circuit Court, which held:

> "Defendant makes the point that plaintiff's counsel did not specifically object to all of the instructions which now appear to be repetitious, citing Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. However, plaintiff's counsel did bring to the attention of the court his objection that numerous portions of the charge were repetitious. One objection which he urged, pointed out that Instruction 40 was 'repetitious of and fully covered by Instructions 39, 58, 59, 60, 61 and 66, as well as many other Instructions.' We hold it was unnecessary to break down the objection to the instructions into smaller segments or components in order to point out their repetitious nature. We think there was a sufficient compliance with Rule 51."

IV. A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE PRESUMPTION OF DUE CARE OF A PARTY (THAT THE LAW HAS BEEN OBEYED) WHERE EVIDENCE AND TESTIMONY OF THAT PARTY WAS INTRODUCED AT THE TRIAL.

It is difficult to understand what respondent means when he claims at pp. 33-34 of the Answering Brief ". . . that the Court did not instruct the jury that a party is presumed to have exercised ordinary care or

'due care'." All of the cases in California cited in Appellant's Opening Brief, at pp. 47-52, hold that an instruction which states ". . . the law presumes . . . that the law has been obeyed" constitutes an instruction on the presumption of due care and obviously have direct application in this case.

A reading of the transcript at p. 414 would reflect that the so-called "only objection" claimed to have been made by Appellant's counsel to the cited erroneous instructions on presumptions set forth at p. 34 of Appellee's Answering Brief is totally misleading and incorrect, and would further show that the trial court was notified that the language "unless and until outweighed by evidence in the case to the contrary" was not the law in the State of Nevada, even if it was or had been in the State of California. In other words, Nevada never has adopted the doctrine that presumptions constitute continuing evidence which may be considered by the jury notwithstanding the introduction of testimony and evidence of the issue, as was held in *Smellie v. Southern Pacific Co.,* 212 Cal. 540, 299 Pac. 529 (1931). Thus, Appellee's counsel misconstrues the meaning of Appellant's objections that the State of Nevada does not have the same laws as the State of California, in citing Nevada Revised Statutes 52.070. The fact that Nevada has the same statute in nowise justifies the giving of an instruction that there is a presumption that the law has been obeyed, when offered by a party defendant who has personally testified concerning his conduct and introduced evidence on the manner of his operation of the automobile. All of the California cases cited by Appellant in her Opening Brief demonstrate the fallaciousness of this reasoning.

Appellee's argument that these California cases are not applicable in the instant case because the instruction actually given by the Court would benefit Plaintiff to a greater extent than it would benefit Defendant is equally

absurd. Obviously the same contention was subject to being made in all of those California cases cited and rejected by reason of the prejudicial and reversible error which was found to exist by reason of the giving of an instruction on the presumption of due care. The burden was upon Plaintiff to prove negligence on the part of Defendant Mario Delizio, and Plaintiff was entitled to establish that negligence without the additional burden of having to meet and "overcome and outweigh" a "presumption" that the law had been obeyed by Defendant Delizio.

Appellee's citation of *Solen v. V. & T. R. R. Co.,* 13 Nev. 106 (1878) is of no assistance to him. In the first place, no reference was made in the particular instruction involved in the *Solen* case to any *presumptions.* Secondly, the jury was instructed that "The known and ordinary disposition of men to guard themselves against danger" was only to be considered by it *together with the other facts of the case.* Nothing was contained in the instruction which told the jury, as was done in the principal case, that a *presumption* exists on that subject so long as "it is not *overcome or outweighed* by evidence in the case to the contrary, and none of the compelling and peremptory language requiring the jury to be bound to find in accordance with the presumption was contained in the instruction considered by the Nevada Supreme Court in the *Solen* case. Thus, the prejudicial effect of the presumption "that the law has been obeyed" in the principal case was in nowise involved in the *Solen* decision, wherein the jury was merely given the opportunity to consider the known and ordinary disposition of men along with all the other facts in the case. As pointed out by the Supreme Court of Nevada, that was only one of the tests by which the Plaintiff's proven conduct was to be measured, rather than being given any special class as a "presumption" which "continued to exist" "unless and

until outweighed by evidence in the case to the contrary" which was reiterated on two separate occasions in the particular instruction excerpted and objected to by Appellant herein.

It is also interesting to note Appellee failed to include the last paragraph of the Supreme Court of Nevada's opinion in discussing the instruction involved in the *Solen* decision: "The portion of the instruction complained of does not, in our opinion, authorize the jury to *presume anything in favor of the plaintiff,* in opposition to the facts established by his testimony." (emphasis added) Thus, it is apparent that the instruction was totally different from that given by the trial court in the instant case.

Not only did Appellant's counsel specifically quote the instruction and point out to the trial court that the evidence had dispelled and eliminated any such presumptions in this particular case, and specifically stated "We think for the jury to be given that instruction is improper;" the transcript at p. 414 shows that the Court specifically considered the matter, and the statement made by Appellee that "There was no way in which the court could have anticipated this objection or could have corrected the error, if any. F.R.C.P. 51" This quote wholly ignores what is contained in the record. The following appears at pp. 414-415 of the transcript, following the exception and objection made to the instruction by Appellant's counsel:

> "The Court: You mean those presumptions did not exist?
>
> Mr. Richard Wait: Not in this case.
>
> The Court: I am afraid they do exist, counsel."

Shanahan v. Southern Pacific Co., 188 F.2d 564 (9th Cir. 1951), cited by Appellee for the proposition that an instruction on the presumption of due care has no preju-

dicial effect and did not operate to deny Appellant any substantial right under F.R.C.P. 61, is typical of this continued effort to utilize these two rules (F.R.C.P. 51 and 61) when Appellee has no substantial basis for distinguishing the merits and validity of the cases cited on behalf of Appellant for reversing the judgment. Unlike the instant case where testimony as to conduct was given, the *Shanahan* case involved an action for wrongful death of decedent, whose testimony concerning his conduct was unavailable to the Plaintiff widow, and therefore, she obviously was entitled to the presumption of due care in the court's instructions. The only issue raised by plaintiff-appellant in that case was whether the trial court erred in the language used with respect to the continuing effect of the presumption of due care once evidence to the contrary on the issue had been introduced, and whether the federal district court had failed to instruct the jury that the presumption that continuing effect was to be weighed by the jury under the doctrine of *Smellie v. Southern Pacific Co.,* supra, as the law then existed in California before adoption of 29-b California Code No. Sec. 600 (a), providing that a presumption is not evidence. Thus, *Shanahan* has no applicability to the issues in this case in any manner whatsoever.

IV. B. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY THAT THE PRESUMPTION OF DUE CARE (THAT THE LAW HAS BEEN OBEYED) WAS A CONTINUING PRESUMPTION TO BE CONSIDERED AS EVIDENCE WHICH MUST BE OUTWEIGHED AND OVERCOME BY OTHER TESTIMONY AND EVIDENCE AT THE TRIAL.

Appellee's conclusion from the language contained in Nevada Revised Statutes 52.070 that disputable presumptions "are satisfactory, if uncontradicted" and that disputable presumptions "may be controverted by other

evidence'' that such disputable presumptions are ''a form of evidence'' is obviously a *non sequitur*. It does not follow that merely because the legislature has declared that disputable presumptions may be controverted that they continue to exist as evidence under the doctrine of *Smellie v. Southern Pacific Co.,* supra. Indeed, the only reasonable construction of such language is that having been controverted by other evidence, such disputable presumptions, being ''disputable,'' thereby vanish.

Nothing contained in *Solen v. V. & T. R. R. Co.,* supra, 13 Nev. 106 (1878) justifies Appellee's statement that it ''held that the presumption of ordinary care is a form of evidence which would rebut the other direct evidence of Plaintiff's contributory negligence and prevent a nonsuit.'' In the first place, the court expressly declared that there was no presumption involved in the instruction which it was considering. Secondly, no reference whatsoever was made to the instruction involving ''a form of evidence'' with respect to ''the known and ordinary disposition of men'' and that language was not said to constitute matters which would rebut the other direct evidence, but rather could be used solely as a means of considering the direct evidence by the jury, and as a part of the test which it ordinarily would apply under standards of reasonable care and prudence.

The quotation by Appellee from 29 Am. Jur. 2d, Evidence, Sec. 135, at pp. 201-203, supports the position asserted by Appellant in its Opening Brief, reflecting that most courts take the view that such a presumption is not evidence, has no weight as such, and disappears completely from the case upon presentation of contravening evidence. Thus, Respondent has wholly failed to answer Appellant's case authorities and exceptions and objections to the instruction making the presumption of due care one which must be overcome and outweighed by evidence on the same issue to the contrary. As set forth in the

cases cited under Sections IV. A. and IV. B. of Appellent's Opening Brief, the court's instruction was prejudicial error and the judgment must be reversed for retrial under the voluminous authorities existing in California and in jurisdictions throughout the United States.

V. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A VIOLATION OF THE RENO CITY ORDINANCE CREATED ONLY A PRESUMPTION OF NEGLIGENCE AS A MATTER OF LAW WHICH MIGHT BE OVERCOME BY EVIDENCE OF THE EXISTENCE OF ORDINARY CARE.

Appellee again relies solely upon F.R.C.P. 51 and 61 in the hope that this court will be deluded into believing that the trial court had "no chance" to rectify the errors contained in these instructions. In this regard we respectfully refer the court to page 394 of the transcript, wherein Appellant's counsel not only informed the trial court there was no evidence under the circumstances which could constitute a rebuttal for a vanishing of the presumption of negligence arising in this case, it was also stated ". . . *and we think that the Instruction is erroneous.*" The Court immediately responded: "The exception is overruled." Thus, a direct attack and exception was made to the Instruction and the trial court was given the opportunity to inspect it further and consider it in the light of the objections made by Appellant. Instead, the Court did not see fit to do so, and without any further inquiry and without extending Appellant's counsel any further opportunity to delineate how and why the Instruction was erroneous, overruled the exception. Under these circumstances, and with the voluminous instructions offered and rejected or accepted over several hours of time, any construction of F.R.C.P. 51 which would hold the exceptions and objections to this instruction insufficient would constitute a manifest injustice.

With respect to the merits of the Court's Instruction, Appellee's contention that "the Instruction says no more than that a violation of law constitutes negligence as a matter of law in the absence of a *preponderance* of evidence that the driver exercised ordinary care under the circumstances," is patently absurd. No effort is made to distinguish the cases cited by Appellant from numerous jurisdictions which directly hold a reversal is required by reason of the giving of such an instruction. Appellee's attempt to convince this Court that no legal distinction exists between an unexcused violation of law and the introduction of evidence of ordinary care to rebut a presumption of negligence in minority jurisdictions such as California, constitutes the Sophist's approach and cannot rationalize the prejudicial error which arises by reason of the giving of such an instruction.

The Nevada Supreme Court decisions cited by Appellant in her Opening Brief are attempted to be distinguished by Appellee on the basis they "merely hold that under the circumstances of those cases it was not prejudicial error to instruct that a violation of the particular law in question was negligence *per se*." It is respectfully submitted by Appellant that if such a strained construction of state law is accepted by any circuit court applying the doctrine of *Erie R. Co. v. Tompkins,* then such state law is subject to total legal emasculation.

Appellee claims that the instruction was "of greater benefit to the plaintiff than any possible benefit which could have accrued to the Defendant." This so-called new legal principle which Appellee has conjured up as the basis for obviating the long established rules of law adopted and applied by the cases cited in Appellant's Opening Brief, can be of no assistance to Appellee in arguing that Plaintiff was the "potential beneficiary" of such an instruction on issues arising under affirmative defenses of contributory negligence pleaded by Defend-

ant where the error affects Plaintiff's burden of proof in establishing negligence on the part of Defendant automobile driver. The two issues are totally separate and distinct, and cannot be used by Appellee as a basis for "harmless error" under the frequently cited rule set forth in F.R.C.P. 61.

It is respectfully submitted that Appellee's attempt to equate Prosser's works as stating that the rules of law of the majority of jurisdictions and the minority of jurisdictions are essentially the same, in that each allows the finder of fact to avoid a conclusive finding of negligence, entirely fails to meet the substance and validity of the legal reasoning contained in all of the cases cited by Appellant in her Opening Brief at pages 60-64. These cases set forth a carefully defined legal distinction between an unexcused violation of law under the doctrine of negligence per se, and evidence of ordinary care which a very few minority jurisdictions permit to rebut a "presumption of negligence". The so-called "rebuttable presumption of negligence" rule does not exist under the law of the State of Nevada, by reason of *Ryan v. The Manhattan Big Four Mining Company,* 38 Nev. 92, 145 P. 907 (1914), and *Southern Pacific Company v. Watkins,* 83 Nev. 471, 435 P. 2d 498 (1967). In view of Nevada's negligence as a matter of law doctrine, the giving of this instruction necessarily constitutes reversible error.

VI. THERE WAS A TOTAL FAILURE BY DEFENDANT TO PLEAD THE AFFIRMATIVE DEFENSE OF PASSENGER CONTRIBUTORY NEGLIGENCE, AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE GIVING OF SAID INSTRUCTION.

Contributory negligence of Plaintiff was never in issue in the trial of this case and the giving of an instruction thereon was reversible error. Said issue was not raised

by Defendant in his Memorandum of Contentions of Fact and Law (Tr. of Rec. 61) and, more importantly, the Court's Pre-Trial Order (Tr. of Rec. 94) clearly eliminated it from the trial. The Pre-Trial Order and the Issues of Fact and Law listed therein make no mention whatsoever of contributory negligence on the part of Plaintiff. Further, the last paragraph provides:

> "The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, *this order shall supersede the pleadings and govern the course of the trial of this cause,* unless modified to prevent manifest injustice." (emphasis added)

The giving of an instruction pertaining to an affirmative defense not disclosed at the pre-trial conference constitutes prejudicial and reversible error. *Taylor v. Reo Motors, Inc.,* 275 F. 2d 699 (10 Cir. 1960). The parties are bound by the pre-trial order and they may not later inject an issue not raised at the pre-trial conference. *McCarthy v. Lerner Stores Corporation,* 9 F.R.D. 31 (D.C. 1949); *Washington v. General Motors Acceptance Corp.,* 19 F.R.D. 370 (1956). See also *Walker v. West Coast Fast Freight, Inc.,* 233 F. 2d 939 (9 Cir. 1956).

Appellant respectfuly submits there is a total absence of evidence of contributory negligence on the part of Plaintiff, and there most certainly is not *substantial evidence* thereof. Plaintiff was merely riding as a passenger in an automobile driven by her husband at a speed of 20 to 25 miles per hour, on a through street, and simply could not have been negligent under the circumstances involved herein. Where the trial court submits to the jury an issue concerning which there is no substantial evidence, the giving of such instruction is prejudicial error. *Leavitt v. De Young,* 263 P. 2d 592 (Wash. 1953). (citing numerous cases) There is a presumption that giving of an instruction not supported by substantial evidence is

prejudicial error. *Evansville Container Corporation v. McDonald,* 132 F. 2d 80 (6 Cir. 1942).

The instruction in question in effect imposed upon Plaintiff the affirmative duty to exercise some degree of control over the vehicle in which she was riding. Yet the law is clear that when one joint "owner" is at the driving wheel and the vehicle is in motion on a highway the other joint "owner" is *not* then in control of its operation *and is not in a position to assert control. Jenks v. Veeder Contracting Co.,* 177 Misc. 240, 30 N.Y.S. 2d 278 (1941).

Again, it should be noted that no cases are cited by Appellee with respect to this issue and no attempt has been made to distinguish the numerous authorities cited in Appellant's Opening Brief. The giving of the instruction on passenger contributory negligence clearly constitutes reversible error.

VII. THE COURT ERRED IN ADMITTING EVIDENCE OF A CLAIM MADE BY DEFENDANT'S PASSENGER ADA SCHAEFER AGAINST PLAINTIFF AND HER HUSBAND AND THAT THE CLAIM HAD BEEN CLOSED.

Appellee's "credibility" argument truly is incredible! The credibility or bias of this witness was never raised by Appellant in her deposition or at the trial prior to its introduction in evidence over Appellant's objections. The subject of the credibility of Ada Schaefer could not be invoked by Appellee by "negativing the present existence of a claim" under the guise of testimony offered by Appellee, aimed specifically at the question of *liability* and intentionally designed to imply an admission of liability on the part of Plaintiff.

The only case cited by Appellee, *Zelayeta v. Pacific Greyhound Lines,* 104 C.A. 2d 716, 232 P. 2d 572 (1951) obviously is not in point and warrants no discussion since

it involves an opposing party's attack upon a witness adverse to it, which Appellant made no effort to do in the instant case. The admission of such testimony was prejudicial to Appellant herein and reversible error.

CONCLUSION

Appellant submits that an objective appraisal and review of the record in this appeal clearly reveals the prejudicial and reversible errors which occurred in the trial of this case. As stated in *Mack v. Precast Industries, Inc.,* 369 Mich. 439, 120 N.W. 2d 225 (1963), cited in our Opening Brief, this Plaintiff was never given a chance. It is respectfully requested that the judgment herein be reversed and the cause remanded for a new trial.

Dated, Reno, Nevada,
January 23, 1969.

Respectfully submitted,

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Attorneys for Appellant.

No. 22304

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATED MACHINE (formerly Associated Machine Shop), a corporation,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (I-R. 76-98) are reported at 48 T.C. 318.

JURISDICTION

This petition for review (I-R. 100-103) involves federal income taxes of $43,088.91 for the taxable year 1959. On June 2, 1965, the Commissioner of Internal Revenue mailed a notice of deficiency, asserting the deficiency in tax. (I-R. 4-5.) Within ninety days thereafter, on August 30, 1965, taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-6.) The decision of the Tax Court was entered June 15, 1967.

(I-R. 99.) The case is brought to this Court by petition for review filed September 15, 1967 (I-R. 100-103), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Section 381(b) of the Internal Revenue Code of 1954 provides that a corporation which transfers its assets to another corporation pursuant to certain types of tax-free reorganizations must end its taxable year on the date of the transfer, and that the acquiring corporation may not carry back a net operating loss for a taxable year ending after the transfer to a taxable year of the transferor corporation, "except" in the case of a reorganization as defined in Section 368(a)(1)(F), i.e., "a mere change in identity, form, or place of organization" of the transferor corporation.

The question is whether the merger of two corporations, which had been conducting separate businesses, constituted an "F" reorganization ("a mere change in identity, form, or place of organization") so as to come within the exception provision of Section 381(b), as the petitioner contends, or solely an "A" reorganization ("a statutory merger"), as the Tax Court held.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and Regulations are set out in the Appendix, infra.

STATEMENT

The facts as stipulated (I-R. 12-20) were adopted by the Tax Court (I-R. 78), and its findings (I-R. 78-88) may be summarized as follows:

Associated Machine Shop (hereafter taxpayer) was a corporation organized on September 10, 1958, principally to carry on the business of fabricating metal parts for use in aircraft, missiles and computers. All of its 503 outstanding shares were owned by Joseph Schiavo. Taxpayer reported its income on a calendar year basis and employed the accrual method of accounting. For 1959, taxpayer's taxable income was $142,655.06. (I-R. 79-80.)

On December 14, 1959, Mr. Schiavo organized a second corporation, J & M Engineering, primarily to conduct a sheet metal fabrication business (the making of cabinets and other such items out of sheet metal). Mr. Schiavo owned all of the 50 outstanding J & M shares. J & M reported its income on a fiscal year basis, from December 1 to November 30, and employed the accrual method of accounting. (I-R. 81-82, 86.) For its initial fiscal period (December 14, 1959, to November 30, 1960), J & M reported an operating loss of $101.70 (I-R. 85) which was thereafter adjusted on audit to $3,641.70 (I-R. 87).

On November 5, 1960, taxpayer and J & M entered into a merger agreement which provided that J & M would be the surviving corporation and that taxpayer would end its existence. In addition, the agreement provided that, as of the effective date of the merger (the date of filing the executed merger agreement with the Secretary of the State of California), the name of J & M would be changed to Associated

Machine and its articles of incorporation would be so amended. The merger was accomplished on November 30, 1960, in accordance with the agreement. Mr. Schiavo received 503 shares of J & M stock in exchange for his 503 shares of the stock of taxpayer. (I-R. 82, 85-86.)

Taxpayer filed a closing tax return for the period January 1 to November 30, 1960, and reported income of $26,790.66. (I-R. 87.)

As stated, J & M had incurred a net operating loss of $3,641.70 for the fiscal period ended November 30, 1960. This loss was carried forward and allowed as a deduction against the income of Associated Machine (formerly J & M and the petitioner here) for the fiscal year ended November 30, 1961. 1/ (I-R. 87.)

For its fiscal year ending November 30, 1962, petitioner reported a loss of $82,863.30. On February 18, 1963, it filed an "Application for Tentative Carryback Adjustment", carrying back the loss to offset taxpayer's pre-merger income for the calendar year 1959. On the application it was stated that "Associated Machine Shop [taxpayer] merged with Associated Machine [petitioner] 11-30-60. This application is being filed by Associated Machine [petitioner], but the carryback pertains to Associated Machine Shop [taxpayer] for the calendar year 1959." The Commissioner, on March 12, 1963, allowed the tentative carryback adjustment in the full amount claimed and thus refunded $43,088.91, plus interest. (I-R. 87-88.)

1/ Associated Machine (petitioner) continued to file its returns on the same fiscal basis as it had when its name was J & M.

In a statutory notice of deficiency, dated June 2, 1965, the Commissioner asserted a deficiency in tax for the calendar year 1959 in the amount refunded, on the ground that it was improper to carry back petitioner's loss to a pre-merger year of taxpayer. (I-R. 88.) 2/ Section 381(b)(3) of the 1954 Code precludes such a carryback except for a reorganization under Section 368(a)(1)(F), i.e., "a mere change in identity, form, or place of organization, however effected."

In the Tax Court, petitioner maintained that its acquisition of taxpayer's assets pursuant to a tax-free reorganization under Section 368(a)(1)(A) of the 1954 Code ("a statutory merger") also qualified under Section 368(a)(1)(F). The Tax Court, in accord with Estate of Stauffer v. Commissioner, 48 T.C. 277, pending on appeal to this Court (Nos. 22277, 22277A, and 22277B), held that the merger of separately-operated corporate enterprises (two brother-sister corporations in this case) does not constitute an "F" reorganization. (I-R. 91-92.)

SUMMARY OF ARGUMENT

The issue here is substantially the same as that presented in Estate of Stauffer, supra. Both of these decisions of the Tax Court are entitled to affirmance for the same reasons.

While Congress has accorded nonrecognition of gain or loss treatment to all corporate "reorganizations" as defined in subparagraphs A to F of Section 368(a)(1) of the 1954 Code, it has expressly declined to treat all reorganizations alike for other tax purposes.

2/ The notice of deficiency was addressed to "Associated Machine (formerly Associated Machine Shop)." That designation meant that the deficiency related to the pre-merger income of taxpayer for its 1959 calendar year. Of course, J & M Engineering was the former name of petitioner, Associated Machine. (I-R. 88.) In short, the notice of deficiency and the caption of this case make reference to petitioner in its capacity as the successor of taxpayer by statutory merger,

In Section 381 it set out in detail the extent to which the "acquirin corporation" in certain tax-free "reorganizations" (those defined in Section 368(a)(1)(A), (C), (D), and (F)) may "succeed to and take into account" specified tax "items" of the transferor corporation. Section 381(a) sets forth the general rule, "subject to the condition and limitations specified in subsections (b) and (c)." Subsection (c lists the particular items to which the general rule applies (e.g., net operating loss carryovers, earnings and profits, methods of accounting, inventories, depreciation allowances). Subsection (b), captioned "Operating Rules", contains additional limitations: it requires that the taxable year of the transferor corporation shall en on the date of the transfer (Section 381(b)(1)), and it precludes the acquiring corporation from carrying back a net operating loss for a taxable year ending after the reorganization transfer to a taxable year of the transferor corporation (Section 381(b)(3)). These limi- tations of Section 381(b) apply to all transactions listed in Section 381(a) "except in the case of an acquisition in connection with a reorganization described in subparagraph (F) of section 368(a)(1)." Section 368(a)(1) in turn defines an "F" reorganization as "a mere change in identity, form, or place of organization, however effected." Accordingly, under the express terms of Section 381, the taxable yea of the transferor corporation terminates, and a net operating loss carryback privilege otherwise available to a corporation under Section 172 is not available, even in the case of a tax-free reorgan zation, <u>unless</u> the reorganization qualifies as an "F" type.

In this case, two brother-sister corporations (taxpayer and J & M), carrying on separate businesses, merged under the laws of California. The separate enterprises formerly conducted by the two corporations were combined and thereafter conducted as one by J & M, the surviving corporation. The Tax Court, consistent with its prior unanimous ruling in Estate of Stauffer v. Commissioner, 48 T.C. 277, pending on appeal to this Court (Nos. 22277, 22277A, and 22277B), held that the merger constituted solely an "A" reorganization ("a statutory merger"), not an "F" reorganization ("a mere change in identity, form, or place of organization"), and therefore did not come within the exception provision of Section 381(b). In so holding, the Tax Court reached the only conclusion compatible with the terms and history of Section 381, the terms and history of the reorganization definitions in Section 368(a), the inter-relationship of those sections and other sections of the Code, the applicable Treasury Regulations, and the relevant decisions.

The reason for the statutory exception in Section 381(b) in favor of "F" reorganizations is apparent from the very statutory description of that kind of reorganization as compared with other kinds (subparagraphs A through E of Section 368(a)(1)). The definition of an "F" reorganization -- "a mere change in identity, form, or place of organization" -- is stricter than that of other types; it is limited to mere formalistic changes in the charter or place of organization of a single corporate enterprise, such as reincorporation in another state, and does not encompass an amalgamation of two or more operating corporations. In the few instances in which the "F"

reorganization definition was applied up to the time of its inclusion in the 1954 Code, it was applied to the reincorporation of a single corporate enterprise, and it was in that setting that Congress re-enacted the definition in Section 368 and incorporated it by referenc in Section 381. In harmony with the legislative history of Section 381 (S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 275-277) and the rigorous definitional requirements of an "F" reorganization, the long-standing Treasury Regulations provide that in the case of a reorganization qualifying under subparagraph F of Section 368(a)(1), the "acquiring corporation" will be treated for purposes of Section 381(b) "just as the transferor corporation would have been treated if there had been no reorganization." Regulations Section 1.381(b)-1 (a)(2). And it is abundantly clear from the examples given in the explanatory Senate Finance Committee Report and the Treasury Regulati that a merger of two or more operating companies constitutes an "A" reorganization, not an "F" reorganization, for purposes of applying the exception provision of Section 381(b). S. Rep. No. 1622, supra, p. 276; Regulations Section 1.381(c)(1)-1(b).

Unless the Congressional distinction between an "F" vis-a-vis an "A" reorganization is to be obliterated, an "F" reorganization is necessarily limited to the reorganization of a single corporation, an does not embrace a fusion of two or more operating corporations. Wherever the demarcation line between an "A" and an "F" reorganizatio is to be drawn, it is plain that an amalgamation of two or more corporate ventures into a single corporate enterprise is more than an "F" reorganization ("a mere change in identity, form, or place of

organization"), and falls on the "A" side of the line ("a statutory merger or consolidation"). While the merger of a single corporation into a newly-created one (reincorporation) may qualify as both an "A" and "F" reorganization, the merger or consolidation of two or more existing corporations cannot. To hold otherwise would for all practical purposes erase any meaningful difference between an "A" and an "F" reorganization, upon which the applicability of Section 381(b) expressly hinges.

The only authority which may be considered contrary to the Tax Court's decision here is a prior decision of the Tax Court itself (Pridemark, Inc. v. Commissioner, 42 T.C. 510, reversed on other grounds, 345 F. 2d 35 (C.A. 4th)), which has been properly (and unanimously) overruled by that court's later and more thoroughly reasoned opinion in Stauffer. And, in Davant v. Commissioner, 43 T.C. 540, modified, 366 F. 2d 874 (C.A. 5th), upon which petitioner also relies, the Tax Court held that the transaction constituted a "D" reorganization, and the Fifth Circuit's alternative holding that it also constituted an "F" reorganization was unnecessary to its decision.

Taxpayer's alternative contention that the separate pre-merger existence of J & M should be ignored is utterly without merit. It is elementary that a corporation formed to serve any business purpose is a separate taxable entity, which its creator is not at liberty to disregard. The record plainly shows, as the Tax Court found, that J & M performed substantial business activities, distinct from those carried on by the taxpayer corporation.

ARGUMENT

THE AMALGAMATION OF SEPARATE CORPORATE ENTERPRISES IS NOT AN "F" REORGANIZATION

A. Introduction

Section 381 of the Internal Revenue Code of 1954, Appendix, infra, 3/ permits a corporation that acquires the assets of another corporation, through the tax-free liquidation of a subsidiary (Section 332) or through certain types of corporate reorganizations (Section 368(a)(1), Appendix, infra), to "succeed to" various tax and accounting attributes of "the distributor or transferor corporation." It also imposes limitations and conditions which concern both the transferor corporation and the acquiring corporation. Two inter-related limitations are that the taxable year of the transferor corporation must end on the date of the transfer (Section 381(b)(1)), which means that the transferor corporation is to file a closing tax return at that time notwithstanding that its usual taxable year would not have ended at that time (Section 1.381(b)-1(c), Treasury Regulatio on Income Tax (1954 Code), Appendix, infra); 4/ and the acquiring corporation may not carry back a post-reorganization net operating loss "to a taxable year of the * * * transferor corporation." (Section 381(b)(3)). These restrictions do not apply, however, if the reorganization is one described in Section 368(a)(1)(F) -- "a mere change in identity, form, or place of organization, however effected."

3/ Section references hereafter are to those of the Internal Revenue Code of 1954, unless otherwise indicated.

4/ References to Treasury Regulations hereafter are to those promulgated under the 1954 Code.

Petitioner claims that its acquisition of the assets of taxpayer pursuant to a statutory merger (Section 368(a)(1)(A)) also qualified as an "F" reorganization because there was complete continuity of enterprise and shareholder interest. Nevertheless, taxpayer (the transferor corporation) ended its taxable year on the date of the merger and filed a closing return covering its separate operations for the portion of its 1959 calendar-taxable year prior to the merger (January 1, 1960, to November 30, 1960) (I-R. 82, 87), as required by Section 381(b)(1) and Treasury Regulations, Section 1.381(b)-1(c). This is significant for, as will be discussed in Point C, infra, that was the only logical approach and it shows that Congress could not have intended that an amalgamation of separately-operated and taxed entities be considered an "F" reorganization.

Moreover, continuity of ownership and business enterprise is, in the general sense in which petitioner uses it, true of every tax-free reorganization defined by Section 368(a)(1). Subdivisions (A) through (D), coupled with Section 354, permit various amalgamating reorganizations in which multiple corporate enterprises may be combined into one corporation. Subdivision (D) and Section 355 permit a divisive reorganization such as a "spin-off," where "a part of the assets of a corporation is transferred to a new corporation and the stock of the transferee is distributed to the shareholders of the transferor." See Commissioner v. Baan, 382 F. 2d 485, 491 (C.A. 9th), pending in the Supreme Court on grant of certiorari (October, 1967 Term, No. 781). Subdivision (E) permits a recapitalization, i.e., the "reshuffling of a capital structure, within the framework of an

existing corporation." Helvering v. Southwest Consolidated Corp., 315 U.S. 194, 202. There is complete continuity of business enterprise in each of these reorganizations in that all business assets remain in corporate solution. What petitioner's argument is reduced to, then, is that the sole criterion of an "F" reorganization is identity of ownership; that an amalgamating or divisive reorganization is "a mere change in identity, form, or place of organization" if the shareholders of the new corporation are the same as the old. This has been rejected by the Court of Claims as to a divisive reorganization in Columbia Gas of Maryland, Inc. v. United States, 366 F. 2d 991 (100 percent continuity of ownership in the resulting two corporations). Similarly, the converse situation here, in which identically-owned separate corporate enterprises are combined, requires the same result.

Prior to the ruling in the instant case, the Tax Court, in a reviewed decision (per Judge Raum), unanimously concluded that such an amalgamation is not a "mere change" in form or identity within the meaning of the "F" provision. Estate of Stauffer v. Commissioner, 48 T.C. 277, pending on appeal to this Court (Nos. 22277, 22277A, and 22277B). Cf. Libson Shops, Inc. v. Koehler, 353 U.S. 382, 387-388. 5/ So doing, the court properly departed from its prior decision in

5/ The Supreme Court specifically approved Newmarket Manufacturing Co. v. United States, 233 F. 2d 493, 497 (C.A. 1st), which held under the 1939 Code that after reincorporation of a single enterprise in another state a carryback was permissible because it was the same in all respects as its predecessor except for the change in corporate domicile. The Supreme Court pointed out that the difference between amalgamating separately-operated and taxed enterprises and reincorporating a single corporate enterprise "is not merely a matter of form." 353 U.S., p. 388.

Pridemark, Inc. v. Commissioner, 42 T.C. 510, reversed on other grounds, 345 F. 2d 35 (C.A. 4th), and refused to follow an alternative holding in Davant v. Commissioner, 366 F. 2d 874, 884 (C.A. 5th), certiorari denied, 386 U.S. 1022. Although the Internal Revenue Service has previously taken the position that a tax-free merger of two or more enterprises could be an "F" reorganization, that position was reconsidered and rejected in light of the history of the "F" provision and other provisions of the 1954 Code. The Commissioner therefore did not maintain that the merger of brother-sister corporations in Davant was an "F" reorganization on appeal to the Fifth Circuit, but argued only that it was a nondivisive "D" reorganization. The Fifth Circuit nevertheless held that the transaction was both an "F" and a "D" reorganization. 6/ As Judge Raum's opinion in Stauffer points out (48 T.C., p. 303), the Solicitor General opposed certiorari in Davant on the ground that the transaction was a "D" reorganization and did not argue the applicability of Section 368(a)(1)(F). We believe that the Tax Court's unanimous decision in Stauffer is unmistakably correct and has been correctly applied in the instant case. 7/

B. The scheme of the reorganization provisions and the language and history of Section 368 (a)(1)(F) indicate that the "F" provision is limited to formalistic changes in a single corporate enterprise

The scheme of Section 368(a)(1) suggests a descending order of significance, with subdivision (F) as the least consequential of any

6/ In Davant the Tax Court held (43 T.C. 540) that the transaction was a "D" (not an "F") reorganization. The Fifth Circuit's holding that it was also an "F" reorganization was unnecessary to its decision.

7/ The Commissioner's brief here is in most respects identical to that filed in Stauffer.

reorganization. Subdivisions (A) through (D), as noted, involve business combinations and divisions; subdivision (E), the structure of a single corporate enterprise. The "F" provision, like the "E", does not describe any particular type of intercorporate transaction - such as a statutory merger or consolidation -- but simply indicates the result that may be accomplished "however effected." That result is the very limited one of "a mere change in identify, form, or place of organization." Considered in its context, that language simply means a reincorporation (a new charter) in the same or in another state and no more. See Berghash v. Commissioner, 43 T.C. 743, 752, affirmed, 361 F. 2d 257 (C.A. 2d); cf. Newmarket Manufacturing Co. v. United States, 233 F. 2d 493, 497 (C.A. 1st). To be sure, the other categories of reorganizations are in a sense concerned with changes in identity or form, but they are not "mere" changes; and to give the "F" provision a broad reading would be to engulf other types of reorganizations, such as the divisive "D", without assimilating their restrictions (see the highly articulated Section 355 and this Court's opinion in Commissioner v. Baan, supra). In other words, subdivisions (E) and (F) are similar in that they do not describe a transaction between corporations, but relate to an intracorporate transaction which results in a change in either the capital or the corporate structure. Thus, the "E" and "F" provisions are said to apply to "'internal' readjustments in the structure of a single corporate enterprise." Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders (2d ed.), p. 507.

The historical setting in which Congress re-enacted the "F" provision into the 1954 Code confirms that understanding of its limited reach. The provision was derived without substantial change, from the Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 202(c). In the period before adoption of the 1954 Code, it was applied where there was a reincorporation of a single corporate enterprise. 8/ E.g., San Joaquin Fruit & Inv. Co. v. Commissioner, 77 F. 2d 723, 724-725 (C.A. 9th), reversed on other grounds, 297 U.S. 496; Ahles Realty Corp. v. Commissioner, 71 F. 2d 150 (C.A. 2d), certiorari denied, 293 U.S. 611; George Whittel & Co. v. Commissioner, 34 B.T.A. 1070. In 1954, the House of Representatives recommended its repeal because the minor alterations it permitted could be accomplished through other types of reorganizations. 9/ See Bittker & Eustice, supra, p. 548. Nonetheless, it apparently was retained "at the request of the tax bar,

8/ Certain of these cases were decided under the Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 203(h)(1)(D), when the "mere change" provision was the "D" reorganization. As additions were made to the reorganization provisions, it became the "E" (see Helvering v. Southwest Consolidated Corp., 315 U.S. 194, 202-203) and finally the "F" in the present Code.

9/ The "F" reorganization is generally accomplished by one of the other forms of reorganization, since no particular steps are indicated by the statute. For example, existing corporation X can merge into newly-formed corporation Y through a statutory merger under Section 368(a)(1)(A) or by a transfer of all its assets under Sections 368(a)(1)(D) and 354(b). Since Y started out as a shell and on the reorganization acquired all the characteristics of X, the only result is a change in the identify, form, or place of organization of X. However, the fact that a transaction which takes the form of an "A", or nondivisive "D", reorganization can amount to merely an "F" has led to some of the confusion regarding the scope of subdivision (F). The confusion results from assuming that if an "A" can be an "F", every "A" is an "F". But, of course, a true "A" -- that is, an amalgamation of separate corporate enterprises -- is not the absorption of a single corporate enterprise into a new shell and is therefore not an "F".

representatives of which noted that subparagraph (F) clearly covered reincorporations of all of a corporation's assets in another state or in the same state after expiration of a charter -- transactions which might not meet the other definitions of a reorganization." 10/ Columbia Gas of Maryland, Inc. v. United States, 366 F. 2d 991, 994, fn. 3 (Ct. Cl.): see 1 Senate Hearings before the Committee on Finance on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., pp. 403, 539. When the present Code was enacted, it had never been thought that the "F" reorganization could involve multiple corporate enterprises -- either the amalgamation of separately-operated corporate enterprises or the division of one corporation into two or more entities. And the very narrow scope of the "F" provision was made clear in the sections of the 1954 Code which make reference to it.

C. Section 381 and its history demonstrate that (1) an "F" reorganization does not include more than a single corporate enterprise and (2) the survivor of a merger (the acquiring corporation) may not carry back a net operating loss to a taxable year of the transferor corporation

1. Section 381(b) creates a set of mechanical rules requiring the closing of the taxable year of the transferor corporation on a tax-free reorganization (and the distributor corporation on a tax-free liquidation), and denying the acquiring corporation a carryback to any pre-acquisition taxable year of the transferor (or distributor)

10/ The fears of the tax bar may have been to some extent justified because, under the law prior to the "F" provision, an exchange of stock pursuant to the reincorporation of General Motors (changing its place of organization from New Jersey to Delaware) was held to be taxable. Marr v. United States, 268 U.S. 536.

Thus, in any reorganization there can be but one acquiring corporation (see Treasury Regulations, Section 1.381(a)-1(b)(2)(i), Appendix, infra), and that corporation alone survives as the taxpayer. If, for example, corporation X merges into corporation Y (as in the present case), Y is the acquiring corporation and will succeed to X's tax attributes (such as net operating losses) for prospective application under Section 381(c); Y will not be entitled to carry back any post-merger net operating losses to any pre-merger year of X. Section 381(b)(3); Treasury Regulations, Section 1.381(c)(1)-1(b), Example (1), Appendix, infra. Section 381(b) would not preclude Y from carrying back to its own pre-reorganization taxable years a net operating loss arising after the merger. 11/ Treasury Regulations, Section 1.381(c)(1)-1(b), Example (1). Thus, the application of Section 381(b) and (c) hinges entirely on the acquiring corporation: it succeeds only prospectively to the tax attributes of the transferor corporation and fully retains its own tax attributes, if any.

Considered in this light, it can be seen why Congress excepted the "F" reorganization from Section 381(b). The reincorporation of a single enterprise in a different state would have required a closing return and loss of a possible carryback when, apart from the change of domicile, the resulting corporation would be the same taxpayer as its predecessor. So the Treasury Regulations, Section 1.381(b)-1(a)(2), Appendix, infra, provide that in an "F" reorganization "the acquiring corporation shall be treated * * * just as the transferor corporation

11/ Note, however, that a net operating loss of X to which Y may have succeeded as a result of the reorganization could not be carried back to any prior taxable year of Y, but could only be carried forward. Section 381(c)(1)(A).

would have been treated if there had been no reorganization." As Judge Raum stated in Stauffer, "The underlying theory of * * * [this provision] quite plainly is that there is such a complete identity between the pre- and post- reorganization enterprises in an 'F' reorganization that the acquiring corporation is to be treated exactly as the transferor corporation would have been treated in the absence of any reorganization." 48 T.C., pp. 297-298.

The Treasury Regulations (Sections 1.381(b)-1(a)(2) and 1.381(c)(1)-1(b), Examples (1) and (2), Appendix, infra) explain the operation of Section 381(b) in connection with a consolidation, merger, and "F" reorganization. They are directly traceable to the report of the Senate Finance Committee, which did the final drafting of Section 381. Examples given in the report establish that the Tax Court correctly applied Section 381 in this case and in Stauffer (S. Rep. No. 1622, 83d Cong., 2d Sess., p. 276 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4914-4915)):

> Paragraph (3) of subsection (b) provides that an acquiring corporation to which property is distributed or transferred in a corporate transaction described in paragraphs (1) and (2) of subsection (a) (except a reorganization described in subparagraph (F) of section 368(a)(1)) is not entitled to carry back a net operating loss for a taxable year ending after the date of distribution or transfer to a taxable year of the distributor or transferor corporation. For example, [1] assume corporations X and Y transfer on December 31, 1954, all their property to Z in a transaction described in subparagraph (A) of section 368(a)(1). If Z has a net operating loss in 1955, such loss cannot be carried back to a taxable year of X or Y. Or, [2] assume corporation X merges into corporation Y on December 31, 1954, in a statutory merger with Y's charter continuing after the merger. If Y has a net operating loss in 1955, such loss cannot be carried back to a taxable year of X but shall be a carryback to a taxable year

> of Y. [3] If, however, corporation X, in a reorganization described in subparagraph (F) of section 368(a)(1), merely changes its identity, form or place of organization, the resulting corporation is entitled to carry back its net operating loss to a taxable year of X prior to the reorganization. (Emphasis added.)

Example 3 in the excerpt deals with the "F" reorganization situation in regard to a single corporation, and example 1 concerns the situation in Stauffer -- consolidation of existing corporations into a new corporation -- and shows that there is to be no carryback to any taxable years of the constituent companies. Example 2 above deals with a merger of two existing corporations in which one retains its charter and, for that reason, its own tax attributes. This case is precisely the same as example 2. Here, the charter of J & M (albeit with a different name) continued after the merger. A carryback would have been permitted to pre-merger taxable years of J & M if any were available. However, no carryback is permissible to any taxable years of taxpayer, the merged corporation. 12/ Insofar as Section 381 deals with carrybacks, it is thus apparent that Congress infused into the 1954 Code the single business enterprise theory that was

12/ Petitioner (Br. 13-14) misstates the holding of Rev. Rul. 58-422, 1958-2 Cum. Bull. 145, in saying that the merger of a parent corporation and its two subsidiaries into a newly-formed corporation "was held to be a Type (F) reorganization." The Ruling held only that the parent's merger into the new shell constituted an "F" reorganization; the "mergers" of the two subsidiaries were held to be "liquidations to which Section 332 applies." Rev. Rul. 58-422, supra, p. 146. (Section 332 provides for the tax-free liquidation of a subsidiary.) The result of that ruling is that the two subsidiaries would be required to file closing returns and that there could be no carryback to their pre-liquidation taxable years under Section 381(a)(1) and (b). Unlike the parent corporation's merger into a newly-formed shell in Rev. Rul. 58-422, supra, taxpayer here merged into an existing corporation (J & M) which had been conducting its own business. Like the two subsidiaries in the Ruling, taxpayer would be required to file a closing return and there could be no carryback to its pre-reorganization taxable years under Section 381(a)(2) and (b).

adopted by the Supreme Court in Libson Shops, supra, and the First Circuit in Newmarket Manufacturing Co. v. United States, 233 F. 2d 493. 13/

The operation of Section 381, reinforced by the plainest legislative declarations and the Treasury Regulations, should be decisive of the present case. But there are, as we will show, even further indications that Congress intended and contemplated that the "F" provision would retain its traditionally limited application to a single corporate enterprise.

2. One of the fundamental principles of Section 381 is that the acquiring corporation shall take into account the tax attributes of the transferor corporation only prospectively. Section 381(c)(1)(A) requires that a net operating loss of the transferor corporation, to which the acquiring corporation succeeds, be carried forward starting with "the first taxable year ending after the date of * * * transfer." Stated another way, the acquiring corporation may not carry back the transferor's net operating loss to any of its pre-reorganization taxable years. Read in this way, it is evident that Section 381(c)(1)(A) is a necessary counterpart to Section 381(b), which precludes a carryback of the acquiring corporation's net operating loss to a pre-reorganization taxable year of the transferor corporation. In combination, Sections 381(b) and 381(c)(1)(A) preven

13/ Those decisions, of course, came down under the 1939 Code, but ea made reference to the 1954 provisions that had already been enacted. Newmarket noted that Section 381(b) would have permitted the carryba in circumstances like those before it (the reincorporation of a sing enterprise in another state). 233 F. 2d, p. 493. The Supreme Court in Libson Shops adopted that same rationale, making special reference to the Newmarket case. It cannot be assumed that these decisions fa to take account of the relevant aspects of the 1954 Code.

the tax attributes of the acquiring corporation to be used retrospectively to change tax results of the pre-reorganization years of the transferor corporation (when it constituted a separately taxed entity), and similarly the tax attributes of the transferor corporation may not be used to alter the pre-reorganization tax results of the acquiring corporation.

Applying petitioner's notion that a reorganization which combines two corporate enterprises can be within the "F" provision, leads to the following anomaly: The highly restrictive Section 381(b), which denies certain advantages to all except the "F" reorganization, would not prevent a carryback of the acquiring corporation's net operating loss to a taxable year of the transferor, whereas Section 381(c)(1)(A) (which does not except the "F" reorganization) would prevent a carryback of the net operating loss of the transferor to a pre-reorganization taxable year of the acquiring corporation even in the case of "a mere change in identity, form, or place of organization" (an "F" reorganization). Plainly, if Congress had intended that the "F" provision encompass more than a single enterprise, it logically would have provided the same exception in Section 381(c)(1)(A) as it provided in Section 381(b). However, the exception for the "F" reorganization in Section 381(b), again we submit, was designed to permit a carryback to a pre-reorganization year of the transferor only when the acquiring corporation is the same taxpayer as the transferor corporation and not when the acquiring corporation is an amalgamation of separately operated and taxed enterprises.

3. An "F" reorganization involving more than a single enterprise would make Section 381(b)(1) unworkable and would run counter to the most elementary principles of taxation. Here, taxpayer, the transferor corporation, filed its pre-merger returns on a calendar year basis, while J & M, the acquiring corporation, filed its pre-merger return on a fiscal year basis. Under petitioner's theory of the "F" reorganization, taxpayer's calendar-taxable year should not have ended on the date of the merger and it should not have filed a closing return. Section 381(b) and Treasury Regulations, Section 1.381(b)-1 (a)(2). But it would have been impossible for J & M to report in the way that taxpayer did before the merger "as if there had been no reorganization" (Treasury Regulations, Section 1.381(b)-1(a)(2)) unless J & M changed its own fiscal-taxable year to a calendar year. That would have meant that in the year of the merger J & M would have reported on a basis exceeding a twelve-month period. Doubtless, to avoid that improper result, taxpayer in fact closed its taxable year on the date of the merger and J & M, the survivor, continued to report income on the same fiscal basis as before the merger. And Section 381(b)(1) plainly requires precisely that procedure. It provides a uniform rule whenever separate corporate enterprises are combined: the transferor corporation ends its taxable year on the date of the transfer and thus reports its income and expenses individually to the extent that it was separately operated for any period prior to the merger; the acquiring corporation, on the other hand, continues to file returns on the same basis as before the reorganization (except that it prospectively succeeds to the tax attributes of the transferor corporation).

Again, it can be seen that in excepting the "F" reorganization from Section 381(b)(1), Congress could only have meant the exception to apply to the reincorporation of a single corporate enterprise.

4. Section 381(a)(2) limits the carryover privilege to non-divisive "D" reorganizations (those that meet the requirements of Section 354(b)). "The section [381] does not apply * * * to divisive or other reorganizations not specified in subsection (a)." S. Rep. No. 1622, supra, p. 276 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4914). The "spin-off" divisive reorganization is the exact opposite of what occurred here. In its basic form it involves a distribution of all the stock of a newly-created subsidiary corporation to the shareholders of the parent corporation. See Sections 355 and 368(a)(1)(D). In that way, business enterprises originally combined in a single corporation can be separated into two or more brother-sister corporations. Here, two brother-sister corporations were consolidated into a single entity.

Taking the expansive view of "identity" or "form" that petitioner adopts, the division of a single corporation into brother-sister corporations cannot rationally be distinguished, for purposes of applying Section 381(b), from the amalgamation of brother-sister corporations into a single corporation.

It therefore stands to reason that, if shareholder continuity were the sole and sufficient test of an "F" reorganization, as petitioner maintains, the spin-off reorganization would come under Section 381(b) through qualification as an "F" reorganization notwithstanding Congress'

intended exclusion. 14/ Neither the spin-off nor the amalgamation of brother-sister corporations is a "mere" change in the tax or business world. The separation or division of a single corporate enterprise into two brother-sister corporations further limits the liability of the common shareholders. Each corporation files its own tax return, and each obtains a surtax exemption under Section 11(d). From the opposite side of the coin, the amalgamation of two brother-sister corporations may increase efficiency or make credit more easily available because of the larger pool of assets in a single unit. And, of course, it will require the filing of one tax return and only one surtax exemption in lieu of two returns and two exemptions. If these represent "mere" changes of identify or form for purposes of the "F" provision, then every tax-free reorganization defined by Section 368(a)(1) is an "F" reorganization. 15/

A fair reading of Section 381, its legislative history, and the "F" provision itself requires the conclusion that an amalgamation of two or more separate corporate enterprises cannot be an "F" reorganization. The Fifth Circuit's alternative holding to the contrary, in

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14/ There is also the problem that from 1934 to 1951, Congress did away with a provision that permitted the spin-off reorganization to be classed as a tax-free reorganization. Commissioner v. Baan, supra, p. 491. If the spin-off could have qualified as an "F" reorganization, Congress' purpose in repealing the provision would have been frustrated.

15/ In addition to the irreconcilable problems relating directly to Section 381 that acceptance of petitioner's theory would create, it would raise difficulties in connection with the complex Section 1244 (losses on the stock of a small business corporation). See Stauffer, supra, 48 T.C., p. 301. Section 1244(d)(2) is headed "Recapitalizations, changes in name, etc." and provides a special rule for an "F" reorganization -- obviously because it involves no more than a change in name or a reincorporation.

Davant, was in an entirely different context than this case. Section 381 was not before the Fifth Circuit and, unfortunately, the legislative evidence presented to the Tax Court and this Court was not presented to it. We consequently urge this Court not to follow the alternative ruling in Davant. For, as Judge Raum stated in Stauffer, "The Code is an extraordinarily complex and sensitive instrument, and we should be careful not to give an interpretation to one provision that would generate unintended difficulties in respect of other provisions, unless such interpretation is clearly called for by the statute itself. In the situation before us we can find no such command in the statute requiring the fusion of these three corporations to be treated as a 'mere change in identity, form, or place of organization.' To the contrary, the indications point the other way." 48 T.C., p. 302. After almost fifty years in which the "F" provision lay dormant and after Congress employed it in the 1954 Code in reliance on its highly restricted compass, it is too late in the day to enlarge it beyond its historic limits. 16/

16/ Petitioner (Br. 30-31) makes a point of language in the opinion below which seems to indicate that the merger of an operating subsidiary into an operating parent corporation might be viewed as an "F" reorganization because the parent could have filed a consolidated return although it did not do so. A reading of the entire paragraph in which the Tax Court discusses consolidated returns (I-R. 97-98) indicates that the discussion was primarily intended to distinguish Rev. Rul. 58-422, supra, which is in any event wholly consistent with the Commissioner's position (see footnote 12, supra).

D. There is no merit to petitioner's argument that the pre-merger separate existence of J & M is to be disregarded

Petitioner maintains (Br. 39-44) that taxpayer and J & M were in reality conducting the same business prior to the merger and that J & M was taxpayer's "alter ego." In other words, it is petitioner's position that its own corporate existence (when it was called J & M) was a sham and the merger with taxpayer was entirely superfluous because the two corporations were truly one from the outset. It is nevertheless questionable at best that petitioner may avoid its own existence as a jural entity or that its creator may disregard the corporate form which he freely elected. Judge Clark explained, in Commissioner v. State-Adams Corp., 283 F. 2d 395, 398-399 (C.A. 2d): "the Commissioner, to prevent unfair tax avoidance, has greater freedom and responsibility to disregard the corporate entity than a taxpayer, who normally cannot be heard to complain that a corporation which he has created, and which has served his purpose well, is a sham." Cf. Shaw Construction Co. v. Commissioner, 323 F. 2d 316, 319-320 (C.A. 9th). The Commissioner's power to treat multiple corporations as one or to otherwise pierce the corporate veil is dependent on the fact that the corporation is formed or availed of principally for tax avoidance and not for a substantial non-tax business purpose. Shaw Construction Co. v. Commissioner, supra; Aldon Homes, Inc. v. Commissioner, 33 T.C. 582. The corporate entity will be afforded recognition if it is "formed for a substantial business purpose or [it] actually * * * [engages] in substantive

business activity." 17/ Aldon Homes, Inc. v. Commissioner, supra, p. 597. See also Moline Properties v. Commissioner, 319 U.S. 436.

Under these standards, petitioner's contention must fail. J & M was admittedly "formed to operate a separate sheet metal business" (see petitiner's Br. 39), whereas taxpayer was principally in the business of fabricating metal parts. Surely, petitioner does not urge that J & M was formed and operated principally for tax avoidance. J & M -- i.e., petitioner -- was separately operated for nearly a full fiscal year prior to the merger, it filed a separate return for that period which was accepted by the Commissioner, and it was the surviving corporation on the merger. There is no authority that permits a tax litigant to disregard its own legal existence in these circumstances or under any similar facts. On the contrary, there is no basis for such a result. See Commissioner v. State-Adams Corp., supra, where claims very much like petitioner's were flatly rejected. Moreover, apart from these legal considerations, the Tax Court properly found as a fact that J & M was distinct from taxpayer. "J & M * * * was organized in December 1959 primarily to engage in a business of fabricating sheet metal products. J & M carried on a separate business, had its own customers, and negotiated its own contracts with them." (I-R. 93.) Before the merger, J & M did business in fairly large volume with eight major corporations in addition to any business it conducted with taxpayer. 18/ (I-R. 84.) The Tax Court's findings are sound.

17/ This Court, in the Shaw Construction Co. case, supra, quoted this language from Aldon Homes, Inc., with approval. 323 F. 2d, p. 320.

18/ The total volume of buainess with customers other than taxpayer exceeded the business conducted with taxpayer. (I-R. 84.)

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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April, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of April, 1968.

_____
MARTIN T. GOLDBLUM
Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 172. NET OPERATING LOSS DEDUCTION.

(a) Deduction Allowed.--There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) [as amended by Sec. 317(b), Trade Expansion Act of 1962, P.L. 87-794, 76 Stat. 872]. Net Operating Loss Carrybacks and Carryovers.--

(1) Years to which loss may be carried.--

(A)(i) Except as provided in clause (ii), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

* * * * *

(B) Except as provided in subparagraph (c), a net operating loss for any taxable year ending after December 31, 1955, shall be a net operating loss carryover to each of the 5 taxable years following the taxable year of such loss.

* * * * *

(2) Amount of carrybacks and carryovers.--Except as provided in subsections (i) and (j), the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the 'loss year') shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. * * *

* * * * *

(c) Net Operating Loss Defined.--For purposes of this section, the term "net operating loss" means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsectin (d).

* * * * *

(26 U.S.C. 1964 ed., Sec. 172.)

SEC. 368. DEFINITIONS RELATING TO CORPORATION REORGANIZATIONS.

(a) Reorganization.--

(1) In General.--For purposes of parts I and II and this part, the term "reorganization" means--

(A) a statutory merger or consolidation;

(B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition);

(C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of substantially all of the properties of another corporation, but in determining whether the exchange is solely for stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded;

(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356;

(E) a recapitalization; or

(F) a mere change in identity, form, or place of organization, however effected.

* * * * *

(26 U.S.C. 1964 ed., Sec. 368.)

SEC. 381. CARRYOVERS IN CERTAIN CORPORATE ACQUISITIONS.

(a) General Rule.--In the case of the acquisition of assets of a corporation by another corporation--

(1) in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies, except in a case in which the basis of the assets distributed is determined under section 334(b)(2); or

(2) in a transfer to which section 361 (relating to nonrecognition of a gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D) (but only if the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met), or (F) of section 368(a)(1),

the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsections (b) and (c).

(b) Operating Rules.--Except in the case of an acquisition in connection with a reorganization described in subparagraph (F) of section 368(a)(1)--

(1) The taxable year of the distributor or transferor corporation shall end on the date of distribution or transfer.

(2) For purposes of this section, the date of distribution or transfer shall be the day on which the distribution or transfer is completed; except that, under regulations prescribed by the Secretary or his delegate, the date when substantially all of the property has been distributed or transferred may be used if the distributor or transferor corporation ceases all operations, other than liquidating activities, after such date.

(3) The corporation acquiring property in a distribution or transfer described in subsection (a) shall not be entitled to carry back a net operating loss for a taxable year ending after the date of distribution or transfer to a taxable year of the distributor or transferor corporation.

(c) Items of the Distributor or Transferor Corporation.--The items referred to in subsection (a) are:

(1) Net operating loss carryovers.--The net operating loss carryover determined under section 172, subject to the following conditions and limitations:

(A) The taxable year of the acquiring corporation to which the net operating loss carryovers of the distributor or transferor corporation are first carried shall be the first taxable year ending after the date of distribution or transfer.

* * * * *

(3) Capital loss carryover.--The capital loss carryover determined under section 1212, subject to the following conditions and limitations;

(A) The taxable year of the acquiring corporation to which the capital loss carryover of the distributor or transferor corporation is first carried shall be the first taxable year ending after the date of distribution or transfer.

* * * * *

(26 U.S.C. 1964 ed., Sec. 381.)

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) In General.--For purposes of this title in the case of income, estate, and gift taxes, imposed by subtitles A and B, the term "deficiency" means the amount by which the tax imposed by subtitles A or B exceeds the excess of:

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over--

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for Application of Subsection (a).--For purposes of this section--

* * * * *

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitles A or B was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made.

* * * * *

(26 U.S.C. 1964 ed., Sec. 6211.)

Treasury Regulations on Income Tax (1954 Code):

§1.381(a)-1 General rule relating to carryovers in certain corporate acquisitions.

* * * * *

(b) Determination of transactions and items to which section 381 applies.-- * * *

* * * * *

(2) Acquiring corporation defined. (i) Only a single corporation may be an acquiring corporation for purposes of section 381 and the regulations thereunder. The corporation which acquires the assets of its subsidiary corporation in a complete liquidation to which section 381(a)(1) applies is the acquiring corporation for purposes of section 381. Generally, in a transaction to which section 381(a)(2) applies, the acquiring corporation is that corporation which, pursuant to the plan of reorganization, ultimately acquires, directly or indirectly, all of the assets transferred by the transferor corporation. If, in a transaction qualifying

under section 381(a)(2), no one corporation ultimately acquires all of the assets transferred by the transferor corporation, that corporation which directly acquires the assets so transferred shall be the acquiring corporation for purposes of section 381 and the regulations thereunder, even though such corporation ultimately retains none of the assets so transferred. Whether a corporation has acquired all of the assets transferred by the transferor corporation is a question of fact to be determined on the basis of all the facts and circumstances.

* * * * *

(3) Transactions and items not covered by section 381. (i) Section 381 does not apply to partial liquidations, divisive reorganizations, or other transactions not described in subparagraph (1) of this paragraph. Moreover, section 381 does not apply to the carryover of an item or tax attribute not specified in subsection (c) thereof. In a case where section 381 does not apply to a transaction, item, or tax attribute by reason of either of the preceding sentences, no inference is to be drawn from the provisions of section 381 as to whether any item or tax attribute shall be taken into account by the successor corporation.

* * * * *

(26 C.F.R., Sec. 1.381(a)-1.)

§1.381(b)-1 Operating rules applicable to carryovers in certain corporate acquisitions.

(a) Closing of taxable year--(1) In general. Except in the case of a reorganization qualifying under section 368(a)(1)(F), the taxable year of the distributor or transferor corporation shall end with the close of the date of distribution or transfer.

(2) Reorganizations under section 368(a)(1)(F). In the case of a reorganization qualifying under section 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of section 368(a)(1)), the acquiring corporation shall be treated (for purposes of section 381) just as the transferor corporation would have been treated if there had been no reorganization. Thus, the taxable year of the transferor corporation shall not end on the date of transfer merely because of the transfer; a net operating loss of the acquiring corporation for any taxable year ending after the date

of transfer shall be carried back in accordance with section 172(b) in computing the taxable income of the transferor corporation for a taxable year ending before the date of transfer; and the tax attributes of the transferor corporation enumerated in section 381(c) shall be taken into account by the acquiring corporation as if there had been no reorganization.

* * * * *

(c) Return of distributor or transferor corporation. The distributor or transferor corporation shall file an income tax return for the taxable year ending with the date of distribution or transfer described in paragraph (b) of this section. If the distributor or transferor corporation remains in existence after such date of distribution or transfer, it shall file an income tax return for the taxable year beginning on the day following the date of distribution or transfer and ending with the date on which the distributor or transferor corporation's taxable year would have ended if there had been no distribution or transfer.

* * * * *

(26 C.F.R., Sec. 1.381(b)-1.)

§1.381(c)(1)-1 Net operating loss carryovers in certain corporate acquisitions.

* * * * *

(b) Carryback of net operating losses. A net operating loss of the acquiring corporation for any taxable year ending after the date of distribution or transfer shall not be carried back in computing the taxable income of a distributor or transferor corporation. However, a net operating loss of the acquiring corporation for any such taxable year shall be carried back in accordance with section 172(b) in computing the taxable income of the acquiring corporation for a taxable year ending on or before the date of distribution or transfer. If a distributor or transferor corporation remains in existence after the date of distribution or transfer, a net operating loss sustained by it for any taxable year beginning after such date shall be carried back in accordance with section 172(b) in computing the taxable income of such corporation for a taxable year ending on or before that date, but may not be carried back or over in computing the taxable income of the acquiring corporation. This paragraph may be illustrated by the following examples:

Example (1). On December 31, 1954, X Corporation merged into Y Corporation in a statutory merger to which section 361 applies, and the charter of Y Corporation continued after the merger. Y Corporation sustained a net operating loss for the calendar year 1955. Y Corporation's net operating loss for 1955 may not be carried back in computing the taxable income of X Corporation but shall be carried back in computing the taxable income of Y Corporation.

Example (2). On December 31, 1954, X Corporation and Y Corporation transferred all their assets to Z Corporation in a statutory consolidation to which section 361 applies. Z Corporation sustained a net operating loss for the calendar year 1955. Z Corporation's net operating loss for 1955 may not be carried back in computing the taxable income of X Corporation or Y Corporation.

Example (3). On December 31, 1954, X Corporation ceased all operations (other than liquidating activities) and transferred substantially all its properties to Y Corporation in a reorganization qualifying under section 368(a)(1)(C). Such properties comprised all of X Corporation's properties which were to be transferred pursuant to the reorganization. In the process of liquidating its assets and winding up its affairs, X Corporation sustained a net operating loss for its taxable year beginning on January 1, 1955. This net operating loss of X Corporation shall be carried back in computing the taxable income of that corporation but may not be carried back or over in computing the taxable income of Y Corporation.

* * * * *

(26 C.F.R., Sec. 1.381(c)(1)-1.)

No. 22,302

IN THE

United States Court of Appeals

For the Ninth Circuit

LOIS COCHRAN,
Appellant,

vs.

MARIO DELIZIO,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an action which originated in the Nevada State courts by the filing of the Complaint (Tr. of Rec. 187-189) in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe and transferred by Petition for Removal (Tr. of Rec. 184-186) to the United States District Court for the District of Nevada, in Reno, Nevada, pursuant to 28 U.S.C., Sec. 1332, and 28 U.S.C., Sec. 1441, on behalf of Defendant Mario Delizio, on the basis of diversity of citizenship, and that the matter in controversy exceeded the sum of $10,000.00. The U. S. District Court had jurisdiction by reason of Plaintiff's residence in the State of Nevada and the resi-

dence of Defendant Mario Delizio in the State of California. A jury was demanded by Defendant.

The appeal is taken as a matter of right under the provisions of 28 U.S.C., Sec. 1291, being an appeal from a final decision of a Federal District Court.

STATEMENT OF THE CASE

This is an action for personal injuries suffered by Plaintiff Lois Cochran arising from an automobile collision which occurred in the City of Reno, State of Nevada, on September 25, 1965, at the intersection of West Street and West 5th Street. (T 117) Plaintiff, a licensed practical nurse employed at the Washoe Medical Center, was a passenger in the right front seat of a 1964 Plymouth automobile operated by her husband, Francis Cochran. (T 118-119) Plaintiff suffered severe injuries to her back, right hip, shoulder, neck, right arm and right leg. (T 123)

The 1964 Plymouth was traveling in an easterly direction on 5th Street at a speed of 20-25 miles per hour. (T 119-120) 5th Street was a four lane, through street, with two lanes for eastbound traffic and two lanes for westbound traffic, and as the Cochran automobile proceeded east, each of the intersecting streets for a period of four-five blocks were controlled by stop signs for northbound and southbound traffic. There was a stop sign at the intersection of West Street, the street on which Defendant Delizio was traveling, as it intersected with 5th Street. (T 14, 120) Plaintiff Lois Cochran and her husband Francis Cochran were familiar with these intersecting

streets and were aware that northbound and southbound traffic was required to stop at these stop signs intersecting 5th Street. (T 276)

Defendant Mario Delizio was operating a 1953 Ford automobile (T 58), was traveling in a northerly direction on West Street toward 5th Street, and approaching the stop sign directly in front of him. There were four passengers in his car, Mr. and Mrs. Furry, Mr. Furry's sister, Ada Schaefer, and Adolph Duerring. (T 107-109) He was 71 years old, lived in Greenville, California (T 77-78), and was returning to his home. In doing so, he ordinarily traveled on North Virginia Street, which was uncontrolled for northbound traffic, but had gotten onto West Street. He had never taken that route before (T 81-82), and was not familiar with this northbound street, nor with 5th Street as a through, intersecting street. (T 82) The weather was clear, visibility was good and the pavement of both streets was dry (T 79) There were no traffic controls for traffic proceeding east on 5th Street at this intersection. (T 120) The Reno City Ordinances provided for a speed limit of 25 miles per hour on such through and controlled streets. (T 21, 66) Reno City Ordinance Sec. 10-111, given in the Court's Instruction No. 9, required Defendant Delizio to stop at the stop sign and yield the right of way to any vehicle which entered the intersection from another street or which was approaching so closely on that street as to constitute an immediate hazard. (T 434-435)

As the Cochrans' 1964 Plymouth approached the intersection, there were no objects to obstruct Delizio's vision to his left. (T 92) By contrast, there was a setback of approximately 19 feet of the intersecting curbline of 5th

Street, or a "jog" to plaintiff's right at its intersection with West Street. (T 11) Thus, the Delizio automobile, upon proceeding forward into the intersection was not in a position where it could be readily seen by either the operator of the Plymouth automobile, Francis Cochran, or Plaintiff Lois Cochran, as the passenger in the right front seat. The photographs of the 1964 Plymouth automobile, Plaintiff's Exhibits 1 through 7, show that it was struck directly broadside at the right front door where Plaintiff was sitting. The point in the intersection where the Plymouth automobile had traveled was almost three-fourths of the way through the intersection (T 287), while Defendant Delizio's automobile had traveled only 6 feet into the intersection, measured from the curbline immediately to Defendant's right. (T 16) Defendant Delizio never saw the Plymouth automobile at any time prior to the collision. (T 91) He did not know which direction he looked first but he could see a good half block down 5th Street to the right and a good half block down 5th Street to the left, and he did not see any traffic at all. (T 85-86, 92) He testified the other vehicle was traveling 60 miles per hour or better (T 90, 113), but he never saw the other vehicle before the collision. (T 91, 112) He saw nothing until they hit. (T 111-112) Plaintiff caught a fleeting glimpse of the 1953 Ford automobile, just before the collision, and it did not appear to her that the Delizio automobile made a stop at the stop sign, although she could not state positively that he did not. (T 150-151) Defendant testified that he stopped at the stop sign (T 83), as did his neighbors and passengers, Mr. and Mrs. Furry (T 197, 210) neither of whom ever drove a car in their life. (T 206, 219)

After the accident, Defendant Delizio got out of the automobile and Francis Cochran stated to him, "You did not stop" (at the stop sign) to which he responded "There is nothing I can do about it." (T 115-116)

A diagram of the scene of the accident was prepared by Reno Police Officer Robert Penegor (T 8), Plaintiff's first witness, and introduced in evidence as Plaintiff's Exhibit 16. (T 37) Appellant respectfully refers the Court to said Exhibit 16 in Folder One of the record on appeal.

Also in Folder One is a portion of the Reno City Police Report, Plaintiff's Exhibit 17, showing, among other things, that the Cochrans' Plymouth automobile traveled in an arc a distance of only 46 feet from the point of impact, clearly negativing the existence of any speed in excess of their testimony that it was 20-25 miles per hour. In a straight line the distance from the point of impact to the point of rest would have been less than 46 feet. (T 32) The admissibility of the reverse side of the Police Accident Report was objected to on behalf of Defendant Delizio because it revealed he had been cited by the investigating officers for failure to yield the right-of-way. Those portions of the report making reference to the citation received by Defendant were deleted by the Court and the remainder was admitted in evidence. (T 61-63)

Plaintiff's Exhibit 3, a photograph, shows the damage to the Cochran automobile from the extreme right front through the right passenger door; the heaviest damage to the 1964 Plymouth automobile was to the center of the right front door by reason of the force generated

from the impact of the Delizio automobile. (T 33-34) The arm rest of the door hit Plaintiff in the right hip area and across her back. (T 121) Defendant's 1953 Ford automobile was a total wreck. (T 94)

The Court permitted the deposition of Ada B. Schaefer, who was sitting in the right front seat of the 1953 Ford operated by Defendant Delizio, to be introduced in evidence and read to the jury, despite numerous objections by Plaintiff. (T 251-268) She did not drive an automobile. (T 308) When she first saw the Cochran Plymouth automobile it was a block away and she claimed it hit the Delizio car. (T 309) She further testified that the Cochran Plymouth automobile was going between 70 and 80 miles per hour (T 309-310), yet she also testified that she had *no idea* how fast the Cochran car was going just before the accident happened. (T 322) Also, over strenuous objection, it was introduced in evidence and read to the jury that she suffered personal injuries and had made a claim against Mr. and Mrs. Cochran which was closed. (T 311) She also testified that Defendant stopped at the stop sign (T 306) and that the Plaintiff's vehicle struck the Defendant's vehicle. (T 308)

During the course of the trial, Defendant's counsel offered evidence that the registered owner of the 1964 Plymouth automobile included the name of Plaintiff Lois Cochran, as well as her husband, Francis Cochran. This was objected to by Plaintiff's counsel upon the grounds that ownership of the automobile was incompetent, irrelevant and immaterial to the issues of the case, and that such alleged ownership could not be used as a basis of imputing any claimed negligence on the part of her hus-

band to Plaintiff. (T 168-169) Detailed objections and authorities were also cited (T 231-244), all of which were rejected by the Court.

The jury retired from the courtroom at 2:20 p.m. and returned to the courtroom at 3:25 p.m. with a verdict for the Defendant and against the Plaintiff. (T 445-446)

The questions involved in this Appeal concern primarily the form and content of numerous instructions to the jury given by the trial court. These questions were raised by the exceptions and objections of counsel to the giving of said instructions. The individual instructions and the objections thereto are set forth in detail in the following section setting forth the Specifications of Errors.

SPECIFICATIONS OF ERRORS

I. The Trial Court Erred in Instructing the Jury That Any Negligence of Plaintiff's Husband as Driver of the Car Was Imputable to Plaintiff.

The Court instructed the jury as follows:

> "If you find there was any negligence on the part of Francis Cochran, the husband and driver of the car, which proximately contributed to the collision, such negligence is deemed to be the negligence of the Plaintiff in this case." (T 422-423)

This instruction was excepted to and objection was made by Plaintiff's counsel at the time the court announced the instruction would be given (T 386) and the Court permitted Plaintiff's counsel to adopt all of the exceptions and objections previously made in support of

Plaintiff's position that the driver's negligence, who was Plaintiff's husband, could not be imputed to the Plaintiff. (T 386)

> We submit, first, under Nevada law it is wholly improper and would be improper for this court to instruct the jury that any negligence of the husband Francis Cochran could be legally imputed to the plaintiff Lois Cochran for the purpose of the case. . . .
>
> Secondly, if the court views the matter as we see it in the alternative, that is, that the question under Nevada law at best would be that if there were under this specific statute, known as the family ownership statute, if this court decided that there could be an imputation of negligence with respect to the operation of the automobile by the husband Francis Cochran as a co-owner then we submit that the testimony under the statute would be one of actual ownership, one of control, with all of the well known requisites of control that ownership implies, and we should like as a factual matter to present evidence that in this case the real owner, the actual owner, was Francis Cochran of this automobile, that he purchased it, that he made the decision with respect to the purchase of the automobile, that he cared for it, that he maintained it, that he saw to it that the automobile be repaired, and for the purposes of imputation of negligence we submit to this court that registration with the Department of Motor Vehicles in the State of Nevada is not a sufficient basis legally or factually for this court to instruct the jury that it might refuse to return a verdict on behalf of plaintiff Lois Cochran by reason of any conduct or negligence of her husband through the pure alternative either/or registration of an automobile with the Department of Motor Vehicles. (T 231-233)

Mr. Richard Wait: We are asking first for the court to consider the Nevada law as distinguished from California law and rule in this case as a matter of law that any conduct or negligence of the husband under Nevada law cannot be imputed to the wife, and alternatively if the court does not so rule that the court rule that the actual ownership, the substantive ownership of the automobile is the issue and is the meaning of the statute in Nevada, which is not the statute in California, if the court please, in that in Nevada we have no statute——

The Court: In other words, counsel, if I understand you, you want to produce evidence that the husband earned the money, that he decided on the make of the car, that he maintained it, that he did this and he did the other thing and that that gives him ownership even though the ownership registration may be in the names of both of them, is that correct?

Mr. Richard Wait: Yes, in the sense that the only person's negligence which can be imputed is the real owner and not someone whose name is on a document. (T 240)

Mr. Richard Wait: Our first point—we haven't fully yet presented it to the court and we should like the court to consider this situation—back in 1940, long before this statute was enacted or before California had its statute, I believe before California had its statute, Nevada had a case and the public policy of this state was decided by Frederickson and Watson Construction Company, which is 60 Nevada 117, which held that a husband's contributory negligence should not be imputed to a wife so as to preclude recovery by the wife from a third person, notwithstanding statutes providing that all property acquired after marriage is community property. (T 241-242)

The final reference to the doctrine of imputation of negligence, an extremely prejudicial one, and the objection thereto, occurred in Vol. 2A of the Transcript, during Defendant's closing argument:

> Now, if Mr. Cochran was careless the court will tell you that his negligence is Mrs. Cochran's negligence, that the law in the State of Nevada requires you to deem the negligence of Mr. Cochran that of Mrs. Cochran, and if the driver of the Cochran car was negligent and his negligence contributed in some degree to this accident, there can be no recovery.
>
> Now, I challenge you to hear this in the instructions. If this is a misstatement of law, of course, the court would stop me and say, "Wait a minute, Mr. Wait, that is not the law, but the law is you cannot give five cents of damages in this case if Mr. Cochran was negligent and his negligence was some part of the cause of the accident."
>
> This is a fiction, of course, but if all of the causes of this accident could be included within the circle I have just drawn, all of the causes, all of the people, the circumstances, the conditions, all of the causes were included within that circle I state to you that the law is that if some part of that cause was the negligence of Mr. Cochran there can be no award of damages in this case.
>
> Mr. Richard Wait: We will object to that as not being the law and the court will not so instruct the jury. This is improper argument.
>
> The Court: Counsel has the instruction or should have the text of the instruction. If the negligence of Mr. Cochran contributed as a proximate cause to the accident. You left the word "proximate" out in your argument, counsel.
>
> Mr. Eugene Wait: Excuse me, your Honor. I will write it in.

The court will tell you what the words "proximate cause" mean. "Proximate cause" means—well, I won't define it because the court will tell you—but if all the proximate causes of the accident are included within this circle and even one percent——

Mr. Richard Wait: I will object to that, if the court please. This is not the law, and we object to it.

Mr. Eugene Wait: It is not the complete statement of the law yet, your Honor.

The Court: Go ahead and finish your argument, counsel.

Mr. Eugene Wait: If one percent of the causes, of the proximate causes, of this accident are the negligence of Mr. Cochran you may not award damages to the plaintiff.

If it [is] your duty to follow that law, and we submit that our analysis of the factual will lead you to conclude (1) that Mr. Delizio did look, (2) that the Cochran car was over half a block away, (3) that he then had the right-of-way to proceed, and did proceed, (4) that Mr. Cochran did not keep a lookout, he either didn't look or he didn't see what was obvious to be seen, namely, that Mr. Delizio was proceeding into the intersection, that he failed to keep a lookout, he failed to take any precaution to avoid the accident, he was negligent, and that his negligence was one of the proximate causes of this accident, and therefore you are duty bound by your oaths as jurors to bring in a verdict for the defendant. (T 2A, 44-47)

The Court further instructed the jury on this subject as follows:

The defendant claims contributory negligence and to establish the defense of contributory negligence the burden is upon the defendant to prove by a prepon-

derance of the evidence that the plaintiff or the driver of the car in which the plaintiff was riding, that is, her husband, was negligent, and that such negligence contributed as a proximate cause of the injury. . . . (T 422)

The burden is on a defendant alleging the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim that the plaintiff herself or the driver of the car, her husband, was also at fault and that such fault contributed (as) one of the proximate causes of any injuries and consequent damages plaintiff may have sustained. (T 424)

The exceptions and objections to these jury instructions were included in those previously set forth above and "deemed by the court to be completely made" with respect to imputation of negligence to the Plaintiff. (T 386)

II. The Court's Instructions on the Definition and Subject of Contributory Negligence, and Especially With Reference to "Some Degree" of Contributory Negligence, Were Prejudicial Error.

The Court instructed the jury as follows:

In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff herself, or the driver of the car in which she was riding, was a proximate cause of any injuries and consequent damage which the plaintiff may have sustained.

Contributory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the

negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the defendant in effect alleges that even though the defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff herself or her husband by her failure or his failure to use ordinary care—and that term will be defined to you in a moment—under the circumstances for her own safety at the time and place in question also contributed one of the proximate causes of any injuries and damages the plaintiff may have suffered. (T 423-424)

These instructions were excepted and objected to by Plaintiff's counsel as follows:

Finally at 73.21 we submit to the court that this is erroneous. . . . 73.21. It reads as follows: 'In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of plaintiff,' and in this case the court has indicated a modification to read 'the driver.'

The Court: Some contributory negligence on the part of the driver of the Cochran automobile?

Mr. Richard Wait: Yes.

Now, your Honor, that isn't the law. There isn't any case that supports the giving of that instruction, that there is some contributory negligence.

The Court: Doesn't it go on there and say that that contributory negligence has to be contributed as one of the proximate causes?

Mr. Richard Wait: Yes.

The Court: All right. Then that clears it.

> Mr. Richard Wait: And we have no instruction that says just some negligence is enough for the plaintiff to recover from the defendant. (T 415-416)

Following the giving of the instruction by the Court, Defendant's counsel argued that one percent of the proximate causes was sufficient under the Court's instruction to constitute contributory negligence, barring plaintiff's recovery. The following statements and objections were made in Defendant's oral argument:

> Mr. Eugene Wait: This is a fiction, of course, but if all of the causes of this accident could be included within the circle I have just drawn, all of the causes, all of the people, the circumstances, the conditions, all of the causes were included within that circle I state to you that the law is that if some part of that cause was the negligence of Mr. Cochran there can be no award of damages in this case.
>
> Mr. Richard Wait: We will object to that as not being the law and the Court will not so instruct the jury. This is improper argument.
>
> * * * *
>
> Mr. Eugene Wait: . . . The Court will tell you what the words "proximate cause" mean. "Proximate cause" means—well, I won't define it because the Court will tell you—but if all the proximate causes of the accident are included within this circle and even one percent——
>
> Mr. Richard Wait: I will object to that if the Court please. This is not the law, and we object to it.
>
> Mr. Eugene Wait: It is not the complete statement of the law yet, Your Honor.
>
> The Court: Go ahead and finish your argument, counsel.

Mr. Eugene Wait: If one per cent of the causes, of the proximate causes of this accident are the negligence of Mr. Cochran you may not award damages to the Plaintiff. (T 2A 45-46)

The Court also instructed the jury on the subject of contributory negligence as follows:

The issues to be determined by the jury in this case are these:

First: Was the defendant negligent?

If your unanimous answer to that question is 'No,' you will return a verdict for the defendant; but if your unanimous answer is 'Yes,' you then have a second issue to determine, namely:

Second: Was the negligence of the defendant a proximate cause of any injury or damage to the plaintiff?

If your unanimous answer to that question is 'No,' you will return a verdict for the defendant; but if your unanimous answer is 'Yes,' then you must find the answer to a third question, namely:

Third: Was the plaintiff or her husband guilty of any contributory negligence?

If you should unanimously find that he or she was not, then, having found in plaintiff's favor in answer to the first two questions, you will determine the amount of plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you should unanimously find, from a preponderance of the evidence in the case, that the plaintiff or her husband was guilty of some contributory negligence, and that plaintiff's or her husband's fault contributed as a proximate cause of any injuries which plaintiff may have sustained, you will not be concerned with the issue as to damages, but will return a verdict for the defendant. (T 424-425)

Exceptions and objections were made to this instruction on behalf of Plaintiff as follows:

> I don't think there is any evidence of negligence on the part of the plaintiff. (T 383)
>
> That is repetitive, . . . is it not, in three places? We think so.
>
> The Court: I have been trying to write instructions for 50 years, and I have read a lot of them, and I have not found anybody yet who can get a complete set of instructions without being repetitive somehow.
>
> So I will give 73.18 of Mathes, 73.21 and 73.23.
>
> Mr. Richard Wait: Your Honor, at what state under your procedure are we expected to make formal exceptions?
>
> The Court: Right now as we go along, as I pass each instruction.
>
> Mr. Richard Wait: Because, you see, I don't have the Mathes book and I have assumed that I should examine this and make a record of it at the end. (T 382-385)

The Court further instructed the jury:

> The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant. (T 425-426)

Exceptions and objections were made to this instruction as follows:

> Mr. Richard Wait: I should like to make an exception to some of the instructions.
>
> The Court: Very well.

Mr. Richard Wait: To the first proposed instruction the court indicated it would give, 71.01, we respectfully submit that the proposed instruction submitted by the court adequately covers the subject and, more important than that, this specific instruction we think is prejudicial to the plaintiff in that it reads that the burden is on the plaintiff in a civil action such as this to prove every essential element of his claim.

Now the jury doesn't know what every essential element is, your Honor, and this puts too great a burden upon the plaintiff, and it puts too great a burden upon the jury to know what every essential element of this claim is.

Secondly, it says if the proof should fail to establish any essential element of plaintiff's claim, and the court has not in any of the jury instructions told the jury what every essential element is, and a juror who listened to this instruction given might be confused and might think that some essential element hadn't been proved, and we submit that there is no necessity for giving 71.01 and respectfully submit to the court that we delete it as covered by the other instructions. (T 412-413)

III. The Trial Court's Instructions on Contributory Negligence of Plaintiff and the Imputation of Her Husband's Alleged Negligence as Driver of the Car Prejudicially Accentuated the Duty of Plaintiff and Minimized the Duty of Defendant, Were Prejudicially Cumulative, Unbalanced, Repetitious and Given in Erroneous Order Prior to Instructions on Defendant's Duties of Care Referable to Defendant's Conduct and Had a Prejudicial Influence and Impact Upon the Jury.

The Court's Instructions given at the very outset of its charge, after stock instructions 1, 2 and 3, are set forth on pages ii-iv of the Appendix.

The repetitiveness of the instructions on contributory negligence and imputation of negligence of Plaintiff's husband as the driver of the car were referred to throughout the settlement of the jury instructions. (T 385, 388-390, 413-416)

In addition, the following specific objections were made and proceedings took place during the course of the settlement of the jury instructions:

> Mr. Richard Wait: Before we get off the subject, we will object to the order of giving the instruction on the duty of care of the rider in an automobile before the instructions of the court given with relation to the applicability to the defendant.
>
> The Court: It doesn't make any difference. We don't get to negligence as a definition or any of the duties of care with regard to the defendant or even an instruction on ordinary care until instruction No. 8. Where do you want me to put it in?
>
> Mr. Richard Wait: Somewhere after the definition of contributory negligence.
>
> The Court: That is just what I did. It just follows contributory negligence.
>
> Mr. Richard Wait: We submit that the duty of care and the instructions with respect to negligence, the conduct of the defendant, that that logically should precede any claims of contributory negligence of a passenger in an automobile, and we would respectfully submit that it should come somewhere around 18-A or 19-A, which follows the instruction with respect to the duties of both drivers since the passenger's duty necessarily follows the duty of the driver in logical order. (T 388)

During the course of settlement of the jury instructions (T 340-417) the Court at no time provided Plaintiff's

counsel with copies of the instructions which it intended to give from *Mathes & Devitt's Federal Jury Practice And Instructions—Civil and Criminal,* and counsel for Plaintiff had no opportunity to inspect those instructions while they were being settled (T 385-386), nor was the order of the instructions which the Court intended to give ever presented to Plaintiff's counsel in order to object to the total prejudicial effect that they would have upon the jury. After reading some of the individual instructions from *Mathes & Devitt's* edition proposed to be given by the trial court, Plaintiff's counsel made specific objection to particular instructions, but was not informed of the order in which they would be given at any time before the jury instructions were actually read by the Court. (T 412-419)

IV. The Trial Court Committed Prejudicial Error in Instructing the Jury on the Presumption of Due Care of a Party (That the Law Has Been Obeyed) Where Evidence and Testimony of That Party Was Introduced at the Trial, and That Such Presumptions Must Be Overcome or Outweighed by Evidence in the Case.

The Court instructed the jury as follows:

> Presumptions are deductions or conclusions which the law requires the jury to make under certain circumstances, in the absence of evidence in the case which leads the jury to a different or contrary conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until the presumption is so outweighed, the jury are bound to find in accordance with the presumption.
>
> Unless and until outweighed by evidence in the case to the contrary, the law presumes that a person

is innocent of crime or wrong; that official duty has been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed. (T 429)

Exceptions and objections were made to these instructions, after quoting them, as follows:

We don't think that part should be given in this case. We think that the evidence has dispelled or eliminated any presumptions. The State of Nevada does not have the same laws as the State of California, and we think for the jury to be given that instruction is improper.

The Court: You mean those presumptions are not correct?

Mr. Richard Wait: Excuse me?

The Court: You mean those presumptions did not exist?

Mr. Richard Wait: Not in this case. (T 414)

V. The Trial Court Erred in Instructing the Jury That a Violation of the Reno City Ordinance Created Only a Presumption of Negligence as a Matter of Law Which Might Be Overcome by Evidence of the Exercise of Ordinary Care.

The Court instructed the jury as follows:

A violation of that ordinance of the City of Reno or state law which I have just read to you creates a presumption of negligence as a matter of law.

However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, you find by a preponderance of the evidence that the driver with which you are immediately concerned did what might reasonably be expected of a person of

ordinary prudence, acting under similar circumstances, who desired to comply with the law. (T 435-436)

Exceptions and objections to this instruction were made as follows:

Mr. Richard Wait: Insofar as the plaintiff is concerned, your Honor, we submit that there is no evidence under the circumstances which could constitute a rebuttal for vanishing of the presumption of negligence arising in this case in the violation of the defendant, and we think that the instruction is erroneous.

The Court: The exception is overruled. (T 394)

The Court also instructed the jury:

The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.

The basic speed law of this state as provided by Section 484.060 of the Nevada Revised Statutes is as follows:

'. . . it shall be unlawful for any person to drive or operate a vehicle of any kind or character . . . at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or . . . at such a rate of speed as to endanger the life, limb or property of any person.' (T 435)

Exceptions and objections to this instruction were made as follows:

The Court: Is there an exception?

Mr. Wait: Yes, your Honor.

The Court: On the ground that it is not the law?

Mr. Richard Wait: On the ground that the Nevada Revised Statutes are not applicable and that the instruction on the subject of speed is improper. The evidence before the jury already is that for traffic on Fifth Street there is a 25 mile speed limit, and we think that any instruction on speed should be the city ordinance to the effect that it is 25 miles per hour.

The Court: Your exception is overruled. (T 393-394)

VI. There Was a Total Failure by Defendant to Plead the Affirmative Defense of Passenger Contributory Negligence, and the Evidence Was Insufficient to Support the Giving of Said Instruction.

In addition to the numerous instructions set forth above concerning alleged contributory negligence on the part of Plaintiff Lois Cochran, the Court also instructed the jury as follows:

> The rider in a vehicle being driven by another has the duty to exercise ordinary care for her own safety. This duty, however, does not necessarily require the rider to interfere in any way with the handling of the vehicle by the driver or to give or attempt to give the driver advice, instructions, warnings or protests. Indeed, it would be possible for a rider to commit negligence by interfering with or disturbing the driver.
>
> In the absence of indications to the contrary, either apparent to the rider or that would be apparent to her in the exercise of ordinary care, the rider who herself is not negligent has a right to assume that the driver will operate the vehicle with ordinary care.

However, due care generally requires of the rider that she protest against obvious negligence of the driver, if she has reasonable opportunity to do so.

But the manner in which the rider must conduct herself to comply with the duty to exercise ordinary care depends on the particular circumstances of each case; and in the light of all those circumstances the jury must determine whether or not the rider acted as a person of ordinary prudence and exercised ordinary care. (T 438)

Exceptions and objections were specifically made as previously set forth hereinabove. (T 383-388)

VII. The Court Erred in Admitting Evidence of a Claim Made by Defendant's Passenger Ada Schaeffer Against Plaintiff and Her Husband and That the Claim Had Been Closed.

During the course of the trial Defendant offered and read into evidence the deposition of Ada Schaeffer, a passenger in the right front of Defendant Mario Delizio's 1953 Ford automobile, which included the following:

Q. Okay. As a result of these injuries did you make a claim against Mr. and Mrs. Cochran?

A. Well, yes, there was a claim.

Q. Is that claim presently pending?

A. No, it's closed. (T 311)

The objection thereto had been previously made and overruled, as follows:

Mr. Richard Wait: We will object to the witness saying she was in sort of a daze, starting at page 10 at line 26, and with reference to the injuries and the insurance and the settlement of the claim of this witness, which takes us through page 11, line 25, and we respectfully submit that to admit that evidence would

be entirely prejudicial to the plaintiff in this case with respect to claims made by an independent witness who is not a party to the action. (T 261-262)

* * * *

Mr. Richard Wait: Your Honor, may I respectfully submit to the court that the ruling should include back to line 16 as to the claim against the Cochrans because this witness in this courtroom could not come up to this witness stand and testify as a witness and include in her testimony that she had a claim pending against the Cochrans! The claim of any other party in that automobile is wholly immaterial and beyond the scope of the issues in this case as to Mrs. Cochran's right to recover against Mr. Delizio. And, your Honor, I think that the only fair thing in this case would be if there is going to be reference to injury that the claim be deleted which commences at line 16 through 20. (T 262-263)

* * * *

Now the clear purpose, your Honor, in this case is to show this injury, that someone else made a judgment that the Cochrans were at fault, that the Cochrans were wrong, and that some amount of money was paid to this passenger in this automobile. (T 264)

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT ANY NEGLIGENCE OF PLAINTIFF'S HUSBAND AS DRIVER OF THE CAR WAS IMPUTABLE TO PLAINTIFF.

It is readily apparent from the record that this case has absolutely nothing to do with the "family purpose doctrine," yet the only authority urged upon the trial court for the giving of the imputed negligence instruction

was Nevada's family purpose statute, N.R.S. 41.440. (This statute, plus its supplementary sections, N.R.S. 41.450 and 41.460, are set forth in full at page i of the Appendix.)

A cursory review of said statute reveals that it is a typical family purpose statute, imposing joint and several liability upon the owner and the other members of the immediate family involved in a motor vehicle accident. The purpose of such a statute essentially is the public policy of placing the responsibility for the operation of an automobile being used for family purposes upon the owner thereof. *Bartek v. Glasers Provisions Co.*, 160 Neb. 794, 71 N.W.2d 466 (1955). It is applicable only to specific and limited situations (as indicated by the fact that it has never once been cited by an appellate court despite its 11 year existence) and is not even remotely connected to the present case. It is not an "ownership statute," such as that of California and many other jurisdictions, which statutes are much broader, imposing liability upon the owner for the negligence of *any* permissive user.

Nevada does not have an ownership statute and, irrespective of any statute, the case law in Nevada makes it abundantly clear that the negligence of the husband *cannot* be imputed to the wife in a situation as presented herein.

The leading case is *F. & W. Construction Co. v. Boyd,* 60 Nev. 117, 102 P.2d 627 (1940) involving a factual situation virtually identical to the present case, wherein the wife was a passenger in an automobile driven by her husband, and in which she sought damages for injuries incurred by the negligence of a third party. On appeal,

the Court stated the issue to be whether the contributory negligence of the husband can be imputed to the wife in the State of Nevada.

The Court held, at p. 123, "that the contributory negligence of the husband *cannot* be imputed to the wife in this state." Initially it was pointed out that six of the eight community property states that had passed on the question, including California, had held that the husband's contributory negligence *could* be imputed to the wife, apparently because in those states the wife's recovery of damages for personal injuries is community property, the rationale being that the wrongdoing husband should not be permitted to share in the proceeds. Despite this authority, the Court stated, at p. 120:

> Ordinarily, such an array of reputable authority would almost at once persuade us to follow the same course. But careful analysis has led us to the conviction that in the beginning the course was charted wrong, and 'there is no sufficient ground of justice or social policy to refuse the innocent wife any and all recovery because of the husband's contributory negligence.' (24 Cal. Law Review 741)

The Court then held that the recovery of the wife for her personal injuries was her separate property.

It is important to note that N.R.S. 41.440, .450 and .460 became effective July 1, 1957. Yet the case of *Lee v. Baker,* 77 Nev. 462, 366 P.2d 513 (1961), decided four years later and which is directly in point, does not even mention the above statute. It involved a two-car automobile accident, one car driven by Baker and the other by Lee. The plaintiffs, Robert Baker, his wife and their

daughter, all brought suit against the adverse driver. Defendant's answer set forth the affirmative defense of contributory negligence on the part of Robert Baker, alleging that his contributory negligence was imputable to his wife Alma Baker and to Marva, the daughter. The jury found in favor of the wife and the daughter but against the husband's claim for personal injuries, apparently because of his own contributory negligence. The Court held, at p. 465:

> The jury properly was instructed that any negligence of Robert E. Baker was not imputable to his wife or daughter. Therefore, a verdict in their favor for their own personal injuries could be upheld * * * regardless of any negligence on the part of Robert E. Baker * * *.

As authority for the above holding the Court cited *F. & W. Construction Co. v. Boyd, supra.*

Cook v. Faria, 74 Nev. 262, 328 P.2d 568 (1958) involved an action by an automobile passenger against the driver and the driver's husband, who also was a passenger. The automobile was referred to by the husband and wife as "our car" and was conceded to be owned by both defendants. After pointing out that there was a complete absence of any evidence to the effect that the husband, Charles Cook, took any part in directing his wife's operation of the vehicle, the Court held at p. 263:

> Judgment against Charles Cook can, therefore, be supported only if his wife's negligence can be imputed to him. *The doctrine of such imputed negligence has never been adopted in this state.* (Emphasis supplied.)

(The *Cook* decision was rendered August 11, 1958, more than a year after the enactment of N.R.S. 41.440.)

The most recent pronouncement on this subject is *Morrissett v. Morrissett*, 80 Nev. 566, 397 P.2d 184 (1964) where Justice Thompson reiterates the principle of law in Nevada against imputing negligence of the spouse-driver to the spouse-guest to bar relief, citing *F. & W. Construction Co. v. Boyd, supra.*

The Court of Appeals for the Ninth Circuit has also pointed out that it is the law of Nevada that the contributory negligence of a husband is no bar to a recovery by the wife, stating in *King v. Yancey,* 147 F. 2d 379 (9th Cir. 1945), in footnote 2 on p. 380:

> In Nevada, while the husband must join in a suit for injury to the wife, the damages recovered for the injury belong to the wife alone. Negligence or fault of the husband is no bar to recovery. *Fredrickson & Watson Const. Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627.

The annotation in 35 A.L.R.2d 1199, 1231, entitled: "Spouse's Cause of Action for Negligent Personal Injury As Separate or Community Property" states:

> Under the law of Nevada contributory negligence of a husband constitutes no bar to an action by his wife to recover damages for her personal injuries. (Citing Fredrickson & Watson and King v. Yancey.)

Thus it is clear that it is the law in Nevada that Lois Cochran's cause of action for personal injuries was her own separate property and that any negligence of her husband is not imputable to her, irrespective of the form of ownership of the automobile. N.R.S. 41.440 clearly is

inapplicable and has nothing whatsoever to do with the situation presented herein, as is evidenced by the Nevada authorities cited above.

As for authorities from other jurisdictions, *Bartek v. Glasers Provisions Co.,* 160 Neb. 794, 71 N.W.2d 466 (1955), supra, involved an intersection collision wherein the plaintiff was the owner of and riding in a car operated by her husband. Defendants requested the trial court to instruct the jury that the negligence, if any, of the husband was imputable to the wife on the basis, among others, of the family purpose doctrine. The Court held, at p. 473:

> The family purpose doctrine does not have for its objective the purpose of defeating a claim for damages by a guest by imputing the negligence of a driver to such guest but rather to impose upon the owner of a car being used for family purposes the responsibility for its operation as a matter of public policy. It has no application here.

Brower v. Stolz, 121 N.W.2d 624 (N.Dak. 1963) involved an automobile collision at an uncontrolled intersection. Plaintiff's automobile was being operated by his wife and he sought damages from the third party for the damage to his automobile. Defendant sought to invoke the family purpose doctrine so as to impute the contributory negligence of the wife to the plaintiff owner and thereby preclude recovery. The Court held as follows, at p. 627:

> The family purpose doctrine has no application to a case where the owner of a family automobile seeks to recover for damages proximately caused by the negligence of the operator of another automobile,

> even though the family member driver may have been contributorily negligent.

See also *Michaelsohn v. Smith*, 113 N.W.2d 571 (N.Dak. 1962).

The Iowa Supreme Court in *McMartin v. Saemisch*, 116 N.W.2d 491 (Iowa 1962) refused to apply the family purpose statute to impute the negligence of the wife-driver to the husband-owner, and held that the family purpose statute was intended to protect third parties from the negligence of the bailee-driver of another's car but was not intended to relieve such third parties from the consequences of their own negligence.

The leading case of *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943) involved an automobile collision wherein the plaintiff's wife was riding in a vehicle in which she was a co-owner, the vehicle being driven by the co-owner husband. The defendant sought to impute the husband's contributory negligence to the wife, both on the common law grounds and pursuant to the Financial Responsibility Statute. The trial court gave an imputed negligence instruction and was reversed by the Minnesota Supreme Court, holding that the husband's negligence was not imputable to the plaintiff wife simply because she, as co-owner, consented to his driving the automobile.

As for the common law theory, the Court held that the right of control is the key factor and stated at p. 413:

> Nor is the husband driver necessarily the agent or servant of his wife passenger, even in those cases where the wife herself has purchased the car with her own funds and has registered her ownership.

> The husband is still the head of the family, and when he is at the wheel of that car, even with his wife present, the presumption is that he is in control of the car, and, in the absence of evidence to the contrary, he is solely responsible for its operation. Ownership of a car does not necessarily mean control of that car, any more than ownership of any other property necessarily means control of it.

The Court further stated the correct rule to be as follows, at p. 414:

> Where a husband and a wife are co-owners of an automobile which one of them is driving and in which the other is riding at the time of a collision, the contributory negligence of the driver is not imputable to the other as a matter of law simply because of co-ownership nor because of marital relationship.

The Court further held that the financial responsibility statute, making the permissive user the agent of the owner, was merely intended to provide an injured plaintiff with a solvent defendant and refused to construe the statute so as to impute the negligence of the driver to an owner-plaintiff.

For a number of years, courts throughout the United States have recognized the gross injustice of the whole doctrine of imputation of negligence. A legal principle which permits a woman to be barred from any kind or type of recovery of damages for physical injuries suffered without any personal fault or blame on her part smacks of the rankest type judicial unfairness. The following cases refuse to invoke such a legal doctrine: *Jacobsen v. Dailey,* 36 N.W.2d 711 (Minn. 1949); *Universal Under-*

writers Insurance Co. v. Hoxie, 375 Mich. 102, 133 N.W. 2d 167 (1965); *Weber v. Stokely-Van Camp, Inc.,* 144 N.W.2d 540 (Minn. 1966); *Jasper v. Freitag,* 145 N.W.2d 879 (N.Dak. 1966); *Jenks v. Veeder Contracting Co.,* 177 Misc. 240, 30 N.Y.S.2d 278 (1941); *New York Telephone Co. v. Scofield,* 31 N.Y.S.2d 393 (1941); *Petro v. Eisenberg,* 207 Misc. 380, 138 N.Y.S.2d 705 (1955).

II. THE COURT'S INSTRUCTIONS ON THE DEFINITION AND SUBJECT OF CONTRIBUTORY NEGLIGENCE, AND ESPECIALLY WITH REFERENCE TO "SOME DEGREE" OF CONTRIBUTORY NEGLIGENCE, WERE PREJUDICIAL ERROR.

A. The Definition of Contributory Negligence is Erroneous as a Matter of Law and is Contrary to the Law of the State of Nevada.

The Court gave the following definition of contributory negligence:

> "Contributory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which *cooperates in some degree* with the negligence of another, and so *helps* to bring about the injury." (T 423; emphasis added)

In contrast, the Nevada Supreme Court defines contributory negligence as follows:

> "Contributory negligence is such an act, or omission of precaution, on the part of the plaintiff, amounting in the circumstances to such want of ordinary care as, taken in connection with the negligent act or omission of precaution on the part of the defendant, proximately contributes to the injury complained of."

Musser v. Los Angeles & S.L.R. Co., 53 Nev. 304, 299 P. 1020 (1931).

The substantive differences between the two definitions are tremendous and the prejudicial effect upon the plaintiff is patently obvious.

The instructions given by the court contained repetitious and unwarranted reiteration as to contributory negligence; however, the charge to the jury contains but one definition of contributory negligence, as quoted above. Appellant submits that said instruction does not correctly state the law and is clearly prejudicially erroneous, as was so held in *Leichner v. Basile,* 394 P.2d 742, 743, 744, 745 (Mont. 1964) containing virtually the identical definition. The instruction objected to by plaintiff in the *Leichner* case is as follows:

> "Contributory negligence is negligence on the part of the person injured which *cooperating in some degree* with the negligence of another *helps* in proximately causing the injury of which the plaintiff thereafter complains." (Emphasis supplied by the court.)

The court then held, at p. 744:

> We agree with plaintiff that this was not a correct statement of the law of contributory negligence. The trial court in defining the causal relationship used the words 'cooperating in some degree' and 'helps.' This has never been the standard as plaintiff's negligence must directly relate to the injury, i.e., be the proximate cause thereof. The jury could well have concluded from the instruction that the negligence of plaintiff, if any, contributed remotely to the injury, and that therefore, plaintiff was guilty

> of contributory negligence. The use of the words 'cooperating in some degree' and 'helps' was not a proper standard as it must contribute immediately and as a proximate cause. (Citing cases)

Defendant apparently argued that all of the instructions must be read together, and this cured any possible error. The court then referred to the case of *Wolf v. O'Leary, Inc.*, 132 Mont. 468, 318 P.2d 582, holding that notwithstanding the fact that one of the instructions on contributory negligence did correctly define contributory negligence, such an instruction did not correct the erroneous one. The court then stated:

> In the instant case, unlike the Wolf case, there is only one instruction defining contributory negligence for the jury, and it was erroneous. There was no other instruction to look to for guidance as the jury may have done in the Wolf case. If plaintiff was prejudiced in the Wolf case by having one erroneous instruction and one corrected instruction on contributory negligence, plaintiff was surely prejudiced in the instant case where only one instruction was given defining contributory negligence, it being erroneous and not a correct statement of the law.

The trial court in the *Leichner* case also gave an instruction setting forth the issues to be resolved by the jury, including that of contributory negligence, which instruction was very similar to that given in the present case (T 424-425) The court pointed out that although that instruction did state the issue of contributory negligence for the jury it did not define it, and it was not sufficient to correct the error in the instruction defining contributory negligence.

Another very similar instruction was held to be prejudicially erroneous in *Willhide v. Biggs*, 188 S.E. 876 (W. Va. 1936), at pp. 877-8:

> The court instructs the jury that contributory negligence is such negligence on the part of the plaintiff *as helped to produce the injury complained of,* and if the jury finds from all the evidence in this case that the plaintiff was guilty of *any* negligence that *helped* bring about or produced the injuries complained of, then your verdict should be for the defendants. (Emphasis added)

The plaintiff contended that the standard of *any* negligence that *helped* to produce the injuries complained of is not correct and that it set up too severe a test. The Appellate Court agreed, holding that it was error to give said instruction, stating at p. 878:

> The instruction under consideration tells the jury that the plaintiff may not recover if her decedent was guilty of 'any' negligence, with the further element that such negligence, to defeat recovery, must have 'helped' to bring about the injuries which resulted in the death of the plaintiff's decedent. The case of *State v. Surety Co.* (more correctly styled State ex rel. Myles, Administrator, v. American Surety Co.), 99 W. Va. 123, 127 S.E. 919, we think makes it perfectly clear that this is not a statement of the correct rule.

Appellant respectfully submits that the present instruction also is an incorrect statement of the law, is confusing, sets up too severe a test, and was prejudicially erroneous.

B. The Contributory Negligence Instruction Containing the Phrase "Some Degree" Was Prejudicially Erroneous.

The annotator of a recent annotation in 87 A.L.R.2d 1391, 1396, 1421 entitled "Propriety And Prejudicial Effect of Instructions Referring To The Degree or Percentage of Contributory Negligence Necessary To Bar Recovery," states:

> Considered from the point of view of pure logic, however, this harsh application of the rule of contributory negligence is as contradictory as it is socially undesirable. Accepting as a definition of negligence any conduct amounting to a want of ordinary care under the circumstances, it is at once apparent that it cannot involve slightness, greatness, or other gradations of intensity, and that an individual is either wholly within the exercise of ordinary care or he is entirely without it.
>
> * * * *
>
> As a general proposition, error in an instruction importing a division of contributory negligence into degrees or percentages or impugning the requisite causation is prejudicial or reversible error.

The leading case of *Bahm v. Pittsburgh & Lake Erie Rd. Co.*, 6 Ohio St.2d 192, 217 N.E.2d (1966) is directly analogous to the present case. There was a jury verdict for defendant in a negligence case and on appeal the issue was stated as follows, at p. 219:

> The sole question presented in this case is whether inclusion of the words, 'in any degree' in a charge on contributory negligence constitutes prejudicial error.

After overruling portions of three earlier opinions, the Court held, at p. 221:

> In conclusion we hold that the phrase 'in any degree' or the phrase, 'in the slightest degree,' constitutes prejudicial error to the plaintiff when used in connection with the charge to the jury respecting contributory negligence.

The Court also pointed out, at p. 220:

> Thus the essential element of contributory negligence (other than proximate causation) requisite to bar recovery by the plaintiff is not the comparative extent or degree of negligence, but the existence of negligence itself, for negligence by its very terms either does exist or does not exist. Therefore, a use of the phrase 'in any degree,' intended to modify contributory negligence in a charge to a jury constitutes prejudicial error inasmuch as it tends to confuse a jury and invite a comparison of the relative amount of negligence attributable to the parties involved.

Rainier Heat & Power Co. v. City of Seattle, 193 P. 233 (Wash. 1920) held that a contributory negligence instruction containing the phrase "contributed in any manner" was erroneous, and the case was reversed and remanded.

Howard v. Scarritt Estate Co., 194 S.W. 1144, 1145 (Mo. 1915) held that a contributory negligence instruction containing the phrase "least degree" was erroneous holding:

> We think it is evident from a mere casual reading that the above instruction is erroneous, and that the giving of it alone was a sufficient warrant for the action of the learned court in setting aside the verdict for defendant.

See also *Enyeart v. Waddle,* 191 N.E.2d 583 (Ohio 1962), and *Clark v. State,* 222 P.2d 300 (Cal. 1950), both holding the phrase "slightest degree" to be erroneous and prejudicial to Plaintiff.

In *Willert v. Nielsen,* 146 N.W.2d 26, 31 (N.Dak. 1966), an automobile-pedestrian case in which a jury verdict for the defendant was returned, plaintiff contended that the giving of an instruction on contributory negligence containing such words as "though slight" was prejudicial error. After referring to an earlier decision disapproving of a similar type instruction, the Court held:

> Having disapproved the instruction, it is now time to give meaningful effect to the disapproval. We therefore conclude that the giving of this instruction in the instant case was prejudicial error.

To the same effect see *Mack v. Precast Industries, Inc.,* 369 Mich. 439, 120 N.W.2d 255 (1963).

An important case, and one which is directly in point, is *Devine v. Cook,* 3 Utah 2d 134, 279 P. 2d 1073 (1955). The annotator of 87 A.L.R. 2d 1391, 1448 cited and summarized the case as follows:

> In a well-reasoned opinion, possibly representative of the trend of modern judicial thought, the Utah Supreme Court held it erroneous to instruct that the plaintiff would be barred from recovery if his own negligence proximately contributed to any extent, however slight, to produce his injury, further disapproving the phrases 'to any extent,' 'however slight,' and 'in any degree,' whether used in connection with the degree of proximate cause or the degree of negligence itself.

In *Perkins v. Kansas City Southern Ry. Co.,* 49 S.W. 2d 103 (Mo. 1932) a verdict for defendant was reversed and plaintiff granted a new trial, the Supreme Court holding that use of the words "caused in any degree" in contributory negligence instructions was erroneous and prejudicial error.

In *Danner v. Weinreich,* 323 S.W.2d 746 (Mo. 1959), a judgment for defendant was reversed for the giving of a contributory negligence instruction containing the phrase "however slight," the court holding the instruction misstated the law, misdirected the jury and was prejudicial error. Another case to the same effect, also using the phrase "however slight," is *McCulloch v. Horton,* 74 P.2d 1 (Mont. 1937). See also *Pepsi-Cola Bottling Co. v. Superior Burner Service Co.,* 427 P.2d 833 (Alaska 1967), footnote 5 ("slight negligence").

In *Pignatore v. Public Service Coordinated Transport,* 26 N.J. Super. 234, 97 A.2d 690, 693 (1953), an automobile case, the trial court gave the following instruction:

> If you find, in your deliberations, that the plaintiff *in any degree, slight as that contribution may be,* contributed *in any way* to the happening of the accident that (sic) he would not be entitled to a verdict at your hands. (Italics supplied by court.)

The appellate court then reversed, holding the instruction to be manifestly erroneous.

C. The Reference in Defendant's Argument to "One Percent of the Proximate Causes" on the Part of Mr. Cochran Was Prejudicial Misconduct and Reversible Error.

The case of *Busch v. Lilly,* 257 Minn. 343, 101 N.W.2d 199 (1960), is directly in point. It also involved an inter-

section collision ultimately resulting in a jury verdict for defendant. After the jury had retired to deliberate it returned to the courtroom for additional instructions concerning contributory negligence. The trial court then instructed as follows:

> The law in this state says that if you are guilty of, let's say, five percent negligence in a case you cannot recover. That is the law in this state, putting it on a percentage basis.

The Minnesota Supreme Court held the above reference to percentages to be reversible error, stating: "This Court has repeatedly stated that no reference should be made in a jury charge to a comparative degree or percentage of negligence or contributory negligence."

Iwrey v. Fowler, 367 Mich. 311, 116 N.W.2d 722 (1962), held the following instruction to be objectionable:

> Under our law it does not make any difference if the defendant is 99.9% guilty of negligence, if the plaintiff driver is 1/10 of 1%, or in any way guilty of negligence that contributed to the accident he cannot recover.

The Court pointed out that such an instruction might have been interpreted by the jurors as barring recovery on the basis of negligence so slight as to be immaterial, or possibly on a finding of remote lack of due care as distinguished from negligence proximately contributing to the accident, and that the specific reference to stated percentages was confusing. See also *Macaruso v. Massert,* 190 A.2d 14 (R.I. 1963).

The instructions given in the present case, containing the words "some" contributory negligence and "some

degree," were used in an extremely damaging and prejudicial manner in the closing argument of counsel for Defendant: "and if the driver of the Cochran car was negligent and his negligence contributed in *some* degree to this accident, there can be no recovery." (T 2a 44); "but the law is you cannot give five cents of damages in this case if Mr. Cochran was negligent and his negligence was *some* part of the cause of the accident." (T 2a 45); "if all of the causes of this accident could be included within the circle I have just drawn, * * * I state to you that the law is that if *some* part of that cause was the negligence of Mr. Cochran, there can be no award of damages in this case." (T 2A 45)

The vice inherent in the giving of contributory negligence instructions referring to "degrees" or "percentages" is increased tremendously in a case such as the present one where the "one percent" was *imputed* to an innocent plaintiff. The unfairness is patently obvious.

III. THE TRIAL COURT'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE OF PLAINTIFF AND THE IMPUTATION OF HER HUSBAND'S ALLEGED NEGLIGENCE AS DRIVER OF THE CAR PREJUDICIALLY ACCENTUATED THE DUTY OF PLAINTIFF AND MINIMIZED THE DUTY OF DEFENDANT, WERE PREJUDICIALLY CUMULATIVE, UNBALANCED, REPETITIOUS AND GIVEN IN ERRONEOUS ORDER PRIOR TO INSTRUCTIONS ON DEFENDANT'S DUTIES OF CARE REFERABLE TO DEFENDANT'S CONDUCT AND HAD A PREJUDICIAL INFLUENCE AND IMPACT UPON THE JURY.

As mentioned above, the numerous instructions given by the trial court relating to contributory negligence are set forth in the Appendix, at pages ii, iii and iv.

During the settlement of jury instructions, Plaintiff's counsel reiterated the numerous objections and exceptions to the instructions on contributory negligence and imputation of negligence the Court proposed to give, and urged the trial court to soften the instructions on contributory negligence relating to Plaintiff and on imputed negligence. (T 382-385, 389, 416)

The gravity of the situation reached impossible heights when the trial court saw fit to take additional instructions on the subject of contributory negligence, and related instructions with regard to presumptions and the burden of proof, from *Mathes & Devitt*, 1965 Ed. Federal Jury Practice And Instructions, Civil and Criminal, and gave them at the outset of his instructions in a manner to make it clearly apparent to the jury that the main issues they were to decide were the imputation of negligence on the part of Plaintiff's husband as the operator of the 1964 Plymouth, and contributory negligence on the part of Plaintiff. Indeed, the record shows that all of the instructions initially read to the jury from page 422 to 429 of the Transcript of Testimony, on the issues of liability related solely to absence of negligence on the part of Defendant and were prejudically repetitive and emphasized contributory negligence and imputation of negligence of Plaintiff's husband as the driver of the Plymouth automobile, while at no time *ever* informing the jury of the duty of care owed by Defendant Mario Delizio.

The instructions set forth at pages ii, iii and iv of the Appendix demonstrate the terrible impact and effect upon Plaintiff's case through the prejudicial repetition and re-

iteration of the definitions and meaning of contributory negligence, imputed negligence, and recurring phrases solely referable to Plaintiff, Plaintiff's husband, and their fault, contributory negligence and imputed negligence.

The impact upon the jury of the Court's heavy emphasis and reiteration of contributory negligence at the outset of the Court's charge to the jury was overwhelming, and was so patently prejudicial to a fair evaluation of the evidence by the jury as to render the whole trial a sham and a farce. All of the instructions on contributory negligence, as well as most of the other instructions contained in the Court's charges from pages 422 to 438, inclusive, were specifically excepted and objected to by Plaintiff's counsel, but no one could anticipate the devastating impact and effect upon the jury of the Court's utilization of additional instructions which it read from and did not make available to Plaintiff's counsel at the time jury instructions were settled the preceding day. (T 385)

Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955), supra, involved an automobile collision wherein the jury returned a verdict for defendants. The first error urged by plaintiffs was that the contributory negligence instructions prejudicially accentuated the duty of the plaintiffs and minimized the duty of the defendants. After a detailed analysis of the various instructions, the net result of which was extremely similar to that in the present case, the Court held, at p. 1077:

> "Even assuming that the instructions by the court taken in the entirety could be considered correct as given, the continual repetition of instructions on contributory negligence and the positive delineation of

> the duties of the plaintiffs, as contrasted with the qualified negative statements of the duties of the defendants, unbalanced the instructions in favor of the defendants and influenced the jury in bringing its verdict of no cause of action as against all three plaintiffs, and therefore constituted reversible error."

See also *Clark v. State,* 222 P.2d 300 (Cal. 1950).

Mack v. Precast Industries, Inc., 369 Mich. 439, 120 N.W. 2d 225, 229 (1963), supra, is extremely similar to the situation presented in the present case, inasmuch as the *Mack* case also dealt with the unnecessary repetition of instructions upon the subject of contributory negligence. The instruction involved therein stated that for the plaintiff to recover the jury must find that the decedent "was free of any negligence, however slight, which contributed to his injury." The words "however slight" were repeated sixteen times, six times during the main charge and ten times when the jury had returned to ask the court questions concerning contributory negligence. The Court held, at p. 229:

> We have consistently held that unnecessary repetition of the instructed burden-duty of one party or the other, in a typical negligence case, is of itself argumentatively prejudicial (citing cases). And I experience no difficulty in holding that such error is compounded unto reversible error when the matter thus repeated—sixteen times—is of itself tacitly conceded (by the dissenting Justice) if not patent error. This Plaintiff, like the Dodo, never had a chance. Her decedent by repeated instruction was held to a high or extraordinary degree of common law care on penalty of verdict against her; whereas the defendants were held only to the duty to exercise that de-

> gree of care which the common law exacts generally; that of ordinary or due care. The result was a verdict coerced by erroneous and prejudicial instruction, given repeatedly even after a visibly puzzled jury had twice requested definitive instruction on the subject of what is and what is not negligence and contributory negligence.

The majority opinion also took pains to point out the devastating influence argumentatively erroneous instructions, repeated for one side or the other, have upon jurors, men and women who have just taken an oath to "take the law from the court."

Numerous jurisdictions have held that instructions should not give undue emphasis to any particular phase of the case favorable to either side, and correct statements of the law, if repeated to the point of such undue emphasis, constitute reversible error. *Clarke v. Hubbell,* 86 N.W.2d 905 (Iowa 1957). See also *Shaw v. Congress Building, Inc.,* 113 So.2d 245 (Fla. 1959); *Minga v. Jack Cole Co.,* 12 Ill.App.2d 556, 140 N.E.2d 383 (1956); *Mitchell v. New York Central R. Co.,* 135 N.E.2d 423 (Ohio 1955); *Osmon v. Bellon Construction Company,* 53 Ill. App.2d 67, 202 N.E.2d 341 (1964).

The net effect of the repetition, accumulation and order of the contributory negligence instructions was devastating. The prejudicial effect of these instructions was further driven home by counsel for Defendant in his closing argument: "listen to the instructions of the Court on what should be done about a case where both of the drivers are wrong, and remember that you are required, whether you like it or not, whether you agree with the

law or not, you must follow what the Court tells you about what the law is." (T 2A 39); "regardless of what you personally believe the law is or ought to be. When you swore to try the case and discharge your duties as jurors, you swore to obey the law as the Judge gives it to you. You may not disregard it." (T 2A 40); "you are duty bound by your oath as jurors to bring in a verdict for the Defendant." (T 2A 47)

It is respectfully submitted that in view of these authorities and in simple fairness and justice to Plaintiff, the judgment must be reversed and remanded for a new trial.

IV. A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE PRESUMPTION OF DUE CARE OF A PARTY (THAT THE LAW HAS BEEN OBEYED) WHERE EVIDENCE AND TESTIMONY OF THAT PARTY WAS INTRODUCED AT THE TRIAL.

The Court instructed the jury as follows:

> Presumptions are deductions or conclusions which the law required the jury to make under certain circumstances, in the absence of evidence in the case which leads the jury to a different or contrary conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until the presumption is so outweighed, the jury are bound to find in accordance with the presumption.
>
> Unless and until outweighed by evidence in the case to the contrary, the law presumes that a person is innocent of crime or wrong; that official duty has been fair and regular; that the ordinary course of business or employment has been followed; that things have

> happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed. (T 429)

A very similar instruction was given by the trial court in the frequently cited case of *Ford v. Chesley Transp. Co.,* 101 Cal.App.2d 548, 225 P.2d 997 (1950). The instruction to the jury was that each party was entitled to a presumption of law that every person . . . obeys the law, when there is other evidence that conflicts with such a presumption it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. The California appellate court declared (at p. 1000):

> It was error for the court to give the instruction which extended to defendant, also, the benefit of the presumption. The driver, Porter, testified fully concerning his conduct in backing the truck and trailer across the highway. The presumption may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises. The authorities are unanimous to this effect.

In determining the question whether prejudice resulted to Plaintiff with respect to the presumption of due care being made available to Defendant the Court further declared (at pp. 1000-1001):

> The remaining question is whether it was prejudicial error to give defendant the benefit of the presumption that it exercised due care. We do not doubt that prejudice resulted.
>
> * * * *

It must be assumed that the jury in considering this issue, in accordance with the court's instruction, gave some weight to the presumption that defendant used due care. This gave the defendant a decidedly unfair advantage. To an extent that it is impossible to determine, application of the presumption tended to minimize in the minds of the jurors the dangerous nature of defendant's operation and the precautions that should have been taken.

* * * *

The jury could reasonably have determined that only a minimum of care was exercised and that defendant was guilty of negligence. But the jurors were confronted with the duty of applying the presumption in defendant's favor to offset this substantial evidence of negligence.

* * * *

But the jury, under the instruction, was told that the presumption existed in his favor and should be weighed as evidence even as applied to the facts found with relation to Porter's conduct. Herein lies the vice of the instruction.

* * * *

The presumption has no place in the determination of the question, whether certain acts or omissions, believed by the jury to constitute the conduct of a party, were or were not negligent. The effect of the instruction was to add strength to defendant's claim that it was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that defendant was not negligent. In our opinion the error in giving this instruction was clearly prejudicial.

After considering two other instructions, neither of which was found to be sufficiently erroneous to require reversal of the judgment, the appellate court specifically held that the instruction on the presumption of due care available to defendant was reversible error, requiring the judgment for defendant to be reversed and remanded upon the grounds that it was not improbable that the verdict would have been in plaintiff's favor, had that instruction not been given.

It is readily apparent that the *Ford* decision is direct authority for a reversal of the judgment in the principal case. The presumption of due care made available to Defendant Mario Delizio enabled the jury to consider it as evidence upon the questions of whether he stopped at the stop sign and thereafter yielded the right of way to traffic constituting an immediate hazard, as required by Reno City Ordinance 10-111. The instruction given in the principal case was highly prejudicial in its reiteration of the necessity for the legal presumption of due care to be overcome or outweighed by evidence introduced in the case to the contrary. Furthermore, the instruction was directive, mandatory and compulsory in its form, so that the jury was misled and given the impression it was obligatory to apply such a legal presumption of due care. Its language was:

> Presumptions are deductions or *conclusions which the law requires the jury to make* . . . but unless and until the presumption is so outweighed, the jury are *bound to find in accordance with the presumption* . . . *Unless and until outweighed by evidence in the case to the contrary, the law presumes* that . . . the law has been obeyed. (Emphasis added)

Thus the peremptory language contained in this instruction was far more harmful and prejudicial than that contained in the *Ford* case.

The principle of law that where a party has testified fully as to his acts and conduct immediately preceding and at the time of the accident, a trial court commits prejudicial error by instructing the jury on the presumption of due care, was expressly recognized, invoked and applied by the Supreme Court of California in *Laird v. T. W. Mather, Inc.*, 51 Cal.2d 210, 331 P.2d 617 (1958). The instruction was (set forth at p. 625):

> At the outset of this trial, each party was entitled to the presumption of law that every person takes ordinary care of his own concerns and that he obeys the law. . . .

The balance of the instruction on presumptions was in exactly the same form as that contained in *Ford v. Chesley Transp. Co., supra,* 101 Cal.App.2d 548, 225 P.2d 997 (1950). The Supreme Court of California declared (at p. 624):

> It is now settled that an instruction on the presumption should not be given when the party who seeks to invoke it testifies concerning his conduct immediately prior to or at the time in question. (Citing 14 California appellate decisions.)

In considering the question whether the error was prejudicial, the Court found it important that instructions supplementing those on the presumption of due care overemphasized that party's case who might invoke the benefit of the presumptions. In holding that the erroneous instruction may have tipped the scale in plaintiff's favor

in the deliberations of the jury requiring reversal of plaintiff's judgment in that case, the Supreme Court stated (at p. 624):

> The defendant was thereby forced to overcome by a preponderance of the evidence, not only plaintiff's case that she was free from contributory negligence, but also the presumption that she was acting with due care.

The same principle of law is applicable here. Plaintiff Lois Cochran was forced to overcome by a preponderance of the evidence, not only her burden of proof that defendant Mario Delizio negligently failed to stop at the stop sign and/or negligently failed to yield the right of way to the Cochran automobile as it approached the intersection, constituting an immediate hazard, but also was required by the trial court's instruction to "overcome" and "outweigh" the presumption that Defendant Delizio was acting with due care. Under the circumstances of this case, it is difficult to conceive of a more prejudicial jury instruction than that relating to the court's instructions on the presumption of due care.

Kline v. Southern Pacific Co., 21 Cal.Rptr. 233 (1965) involved instructions on the presumption of due care substantially the same as those in the other cited cases and in the principal case. In reversing the judgment for defendant upon the grounds that the presumption of due care was not available to defendant, and constituted prejudicial error, the California appellate court declared (at pp. 236-237):

> There is no corresponding presumption in favor of respondents since they fully testified and introduced

> evidence on their own behalf as to their acts and conduct immediately preceding and at the time of the accident.
>
> * * * *
>
> The presumption of due care never arose as to them. There being no such presumption, it was error for the court to instruct that respondents were entitled to the presumption of due care.
>
> * * * *
>
> Further, the giving of this instruction was prejudicial. The vice of giving the instruction under the circumstances was to give added weight to respondents' claim that they were free from negligence.

Numerous other cases might be cited herein and are referred to in the cases herein cited establishing that the legal presumption of due care given by the trial court in the principal case was prejudicial error to plaintiff, requiring reversal of the judgment upon this ground alone. Additional cases are: *Bertoli v. Hardesty,* 154 Cal.App. 2d 283, 315 P.2d 890; *Eastteam v. Hall,* 322 P.2d 577 (Calif. 1958); *Britton v. Gunderson,* 324 P.2d 938 (Calif. 1958); *Rozen v. Blumenfeld,* 255 P.2d 850 (Calif. 1953).

It is important to recognize that at the time all of these California appellate decisions were made, the established rule in that state was that a legal presumption of due care, *if properly given at the outset by the trial court,* was deemed to be evidence and as such could be weighed by the jury as against other evidence introduced at the trial. *Laird v. T. W. Mather, Inc., supra,* 51 Cal.2d 210, 331 P.2d 617, 624 (1958).

However, at the time the jury instructions were given by the trial court in the principal case the law in Cali-

fornia had been changed in this respect, and those legal, or "disputable" presumptions are no longer "deemed as evidence" or continuing in nature throughout the course of the trial. In the 1965 revision to the California Evidence Code, made effective January 1, 1967, the definition of a presumption was promulgated and adopted as follows and is found in Vol. 29-B of the California Code Anno., Sec. 600(a):

> A presumption is an assumption of fact the law requires to be made from another fact or group of facts found or otherwise established in the action. *A presumption is not evidence.* (Emphasis supplied.)

Hence, it is extremely significant that the California courts have held on numerous occasions the giving of the instructions on presumption of due care to be prejudicial error where the party who obtained the benefit thereof had fully testified concerning his conduct immediately prior to and at the time of the accident, notwithstanding its then existing law that such presumptions are properly "weighed" with other evidence introduced at the trial. By contrast, the great weight of authority in other jurisdictions of the United States, consisting of as many as 37 separate states, have rejected the proposition that a legal or "disputable" presumption must be weighed and considered by the jury as evidence. They have adopted the legal principle that once evidence is introduced on the same subject of the presumption, it then vanishes and cannot be weighed or considered in any respect by the jury. *A fortiori,* in all of these jurisdictions, including Nevada and California since 1967, the error in the trial court's instruction herein necessarily was more prejudicial

and compounded by the repetitive use of language requiring such presumption to be "overcome" or "outweighed" especially when considered in the context with the mandatory and peremptory terms used in the instruction.

IV. B. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY THAT THE PRESUMPTION OF DUE CARE (THAT THE LAW HAS BEEN OBEYED) WAS A CONTINUING PRESUMPTION TO BE CONSIDERED AS EVIDENCE WHICH MUST BE OUTWEIGHED AND OVERCOME BY OTHER TESTIMONY AND EVIDENCE AT THE TRIAL.

The rule of law established by the great weight of authority existing in at least 37 jurisdictions in the United States is that a legal presumption is not evidence or continuing in nature, but vanishes and cannot be considered by a jury after introduction of testimony or evidence on the subject at the trial. The instruction on presumptions given by the trial court in the principal case placed erroneously heavy emphasis and reiteration upon the phrase "unless and until outweighed or overcome by evidence," thereby making those legal presumptions evidence which must be weighed by the jury against all of the other evidence introduced at the trial. This is not the correct legal principle in Nevada, the federal courts, or at the time of the trial in this case, in the State of California.

In *Ariasi v. Orient Insurance Co.*, 50 F.2d 548 (9th Cir. 1931) the Ninth Circuit considered the effect upon presumptions after evidence on the subject has been introduced at the trial. The Court declared:

> . . . the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does

> not constitute evidence to be placed in the scale, and weighed as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so. . . . A presumption is not evidence, and it has no weight as evidence. It only makes a prima facie case for the party in whose favor it exists. A presumption merely points out the party who has the duty of going forward. The party against whom the presumption operates has the burden of producing satisfactory evidence to rebut the presumption. When this has been done the presumption becomes inoperative, and is laid aside, and the case proceeds as it would if no presumption had been invoked."

The case was reversed upon the sole ground that giving the instruction on the presumption was prejudicial error.

Bates v. Bowles White & Company, 353 P.2d 663 (Wash. 1960) was an action against a broker and an insurer for negligent failure to write hull coverage on plaintiff's boat. The question of ownership was in issue and the court at the pre-trial conference recognized a presumption that all property acquired during coverture was presumed to be community property, even though plaintiff had introduced direct evidence to the contrary which gave rise to a disputed fact. The appellate court reversed a summary judgment and stated:

> "A presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary." (Citing Washington decisions.)

This well established principle of law was invoked by the Arizona Supreme Court in *Seiler v. Whiting,* 52 Ariz. 542 (1938):

> "There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law and presumptions of fact, of conclusive presumptions and disputable presumptions. In truth there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, *in the absence of any evidence to the contrary,* a jury is compelled to reach a certain conclusion of fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule of law imposed by the law, to be applied in the absence of evidence, and whenever evidence contradicting the presumption is offered the latter disappears entirely, and the triers of fact are bound to follow the usual rules of evidence in reaching their ultimate conclusion of fact. As was once said, 'Presumptions may be looked on as the bats of law, sitting in the twilight, disappearing in the sunshine of actual facts.' . . . (84 P.2d at 454)"

Other cases holding that presumptions are not evidence and demonstrating that the instruction was prejudicially erroneous are: *Hertz v. Record Publishing Co.,* 29 F.2d 397 (5th Cir. Pa. 1955); *McElroy v. Forle,* 232 N.E.2d 708 (Ill. 1967); *State v. Lawry,* 405 S.W.2d 729 (Mo. 1966); *Jensen v. City of Duluth,* 130 N.E.2d 515 (Minn. 1964); *Reed v. Queen Anne's R. Co.,* 57 A. 529 (1903); *Klink v. Harrison,* 332 F.2d 219 (3rd Cir. 1964); *King v. Johnson Bros. Construction Co.,* 155 N.W.2d 183 (S.D. 1967); *Gulle v. Boggs,* 174 So.2d 26 (Fla. 1965); *Dwyer v. Ford Motor Co.,* 178 A.2d 161 (N.J. 1962); *Gaudreau v. Eclipse Pioneer Division of Bendix Air Corp.,* 61 A.2d

227 (N.J. 1948); *Allison v. Snelling & Snelling, Inc.*, 229 A.2d 861 (Pa. 1967).

These authorities make it indubitably evident that the judgment must be reversed by reason of the overemphasized burden placed upon Plaintiff in this case to prove her case in chief.

V. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A VIOLATION OF THE RENO CITY ORDINANCE CREATED ONLY A PRESUMPTION OF NEGLIGENCE AS A MATTER OF LAW WHICH MIGHT BE OVERCOME BY EVIDENCE OF THE EXERCISE OF ORDINARY CARE.

The Court instructed the jury:

> A violation of that ordinance of the City of Reno or state law which I have just read to you creates a presumption of negligence as a matter of law.
>
> However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, you find by a preponderance of the evidence that the driver with which you are immediately concerned did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. (T 435-436)

A. Under Nevada Law Violation of a Statute or Ordinance Constitutes Negligence as a Matter of Law.

Ryan v. The Manhattan Big Four Mining Company, 38 Nev. 92, 145 P. 907 (1914), involved the failure of Defendant mining company to provide an iron-bonneted safety cage for raising and lowering employees down a mine shaft as required by a Nevada statute. The Court stated at page 100:

> It has been held, as a general proposition, that whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action, and that the violation of the law is the basis of the right to recover, and constitutes negligence *per se*.

In its decision, the Court made it clear that this mining law was a remedial statute, intended primarily to safeguard the life and limb of those persons who were to be raised and lowered in the shaft. Hence the violation of such a safety statute was negligence as a matter of law in Nevada.

Southern Pacific Company v. Watkins, 83 Nev. ....., 435 P.2d 498 (1967), reaffirmed Nevada law to be that violation of a statute or ordinance designed for the safety of members of the public, is negligence as a matter of law, and not merely a "presumption" of negligence which can be rebutted by other evidence of the exercise of ordinary care. The Nevada statute required an engineer in a railroad locomotive to ring the bell and sound the whistle at least 1,320 feet from a railway crossing. The trial court instructed the jury:

> A violation of this statute which is a proximate cause of an accident constitutes negligence as a matter of law.

The Supreme Court of Nevada expressly approved this instruction, and held that the violation of a statute or ordinance constitutes negligence as a matter of law in Nevada. The Court declared (at page 511):

> The instruction is a recital of a criminal statute (NRS 705.430) and if the jury found a violation

thereof by appellant or its agents which would constitute the proximate cause of an accident, it would amount to negligence as a matter of law.

The use of a violation of a criminal statute as the basis for common-law negligence has been upheld in this state, as well as in many others. (citing *Ryan v. Manhattan Big Four Mining Company, supra*).

Prosser on Torts, § 35 (3d Ed. 1964), states: 'The standard of conduct required of a reasonable man may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate. Within the limits of municipal authority, *the same may be true of ordinances.* The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, except in the comparatively rare case where the penalty is made payable to the person injured, and clearly is intended to be in lieu of all other compensation.' (Emphasis added)

It is manifestly clear, under these Nevada cases, that a violation of Reno city ordinance 10-111 by Defendant Mario Delizio constituted negligence *per se,* and not just a "presumption" of negligence rebuttable by other evidence.

An analysis of the decisions considering this principle of law and legal effect of a violation of a statute or an ordinance demonstrates that the trial court in the principal case instructed the jury and applied the law existing in a few minority jurisdictions in the United States creating merely a rebuttable presumption of negligence

by reason of the violation which is only considered by the jury together with all of the other facts and circumstances disclosed by the evidence in the case. This is not the principle of law recognized by the great weight of authority of jurisdictions in the country, who apply the rule of law in Nevada that a violation of a statute or an ordinance is negligence *per se*. Citation of these voluminous authorities would unduly burden the Court. However, some analogous cases in accord with *Southern Pacific Company v. Watkins,* 83 Nev. ....., 435 P.2d 498 (1967) *supra,* are: *Brand v. J. H. Rose Trucking Company,* 427 P.2d 519 (Ariz. 1967); *Smith v. Portland Traction Company,* 359 P.2d 899 (Ore. 1961); *Martin v. Herzog,* 126 N.E. 814 (Court of Appeals N.Y. 1920).

B. A Violation of the Reno City Ordinance Which Constitutes Negligence as a Matter of Law Cannot Be Overcome by Evidence of the Exercise of Ordinary Care.

It is compellingly clear that the trial court also erred in instructing the jury in this case that a violation of a Reno City Ordinance created only a presumption of negligence as a matter of law *which might be overcome by evidence of the exercise of ordinary care.* In *Alders v. Ottenbacher,* 116 N.W.2d 529 (S.D. 1962), a statute required a car to be equipped with brakes adequate to control the movement, to stop and hold the vehicle and that the brakes be maintained in good working order. The defendant operated his car with defective foot brakes in violation of this statute. The Supreme Court of South Dakota in reversing a lower court judgment for defendant declared (at page 532):

> It may thus be said that when the driver or owner of a motor vehicle violates the specific regulations

as to brakes contained in section 44.0346, supra, he is guilty of negligence as a matter of law unless it appears that compliance was *excusable* because of circumstances resulting from causes beyond his control and not produced by his own misconduct. *Evidence of due care does not furnish an excuse or justification.* The court in Bush v. Harvey Transfer Company, supra, (146 Ohio St. 657, 67 N.E.2d 851), points out the difference: 'Since the failure to comply with * * * a safety statute constitutes negligence per se, a party guilty of the violation of such statute cannot excuse himself from compliance by showing that "he did or attempted to do what any reasonable prudent person would have done under the same or similar circumstances." A legal excuse * * * must be something that would make it impossible to comply with the statute.' (citing cases). (Emphasis added)

In *Florke v. Peterson,* 245 Iowa 1031, 65 N.W.2d 372 (1954), the Supreme Court of Iowa stated (at page 376):

> The ban against passing at or near intersections is not of common law origin making its violation mere evidence depending upon the circumstances of the particular case. The legislature has instead imposed on hurried motorists an absolute duty, in addition to the common law requirement to exercise reasonable care under the existing conditions of the specific case.
>
> The fact that courts recognize there may be a 'legal excuse' for statute violation is quite different from permitting the violator to invoke the common law rule of reasonable care or the care which a reasonably prudent man would exercise under like circumstances.

In addition, the Iowa court set forth the four categories of legal excuse: (1) anything that would make compliance

with the statute impossible; (2) anything over which the driver has no control, which places his car in a position violative of the statutes; (3) an emergency not of the driver's own making, by reason of which he fails to obey the statute; (4) an excuse specifically provided by statute. In conclusion, the Iowa Court stated (at page 376):

> The statute demands something more than 'ordinary care;' or perhaps more accurately, it increases the requirements of ordinary care. Before starting to pass a vehicle in front of him the *driver must make sure* that he is not 'approaching within one hundred feet of or traversing an intersection'. (Emphasis added)

The principles of law set forth in the above cited cases, negativing evidence of the exercise of ordinary care to excuse, rebut or cause a "presumption of negligence" to vanish, and affirming that once a violation of a statute or an ordinance is established the only remaining legal predicate for liability is evidence that the violation was a proximate cause of plaintiff's injury, are equally voluminous as those in the great weight of authority of jurisdictions establishing that the violation constitutes negligence as a matter of law. Additional cases refusing to permit evidence of ordinary care to obviate a violation of a statute or an ordinance are: *Chicago, Rock Island & Pacific Railroad Co. v. Breckenridge,* 333 F.2d 990 (8th Cir. 1964); *Nardi v. Reliable Trucking Co.,* 81 N.E.2d 411 (Ohio 1948); *McConnell v. Herron,* 402 P.2d 726 (Ore. 1965); *Wilde v. Ramsey,* 177 N.E.2d 684 (Ohio 1960).

The trial court committed additional error when it gave an instruction on speed taken from Nevada Revised Statutes 484.060, instead of the Reno City Ordinance estab-

lishing a speed limit of 25 miles per hour for traffic on through and uncontrolled streets.

Without question, a Reno City Ordinance regulating speeds within the City boundaries takes precedence over and preempts a Nevada statute regulating speeds over State highways.

Nevada Constitution, Art. 8, § 8, authorizes "home rule" or self-government for its cities and towns. Pursuant to that constitutional provision, Nevada Revised Statutes 266.010 was enacted, creating such "home rule."

The Charter of The City of Reno, Art. XII, Section N.220, provides, in part: "The city council shall have power to regulate the speed at which cars, automobiles, bicycles, and other vehicles may run within the city limits . . ."

Thus, the city ordinance pertaining to speed preempted the "basic speed law" of Nevada Revised Statutes 484.060, which should not have been given. It enabled Defendant's counsel to argue to the jury that "some violation" of N.R.S. 484.060, on the part of Plaintiff's husband, Francis Cochran, even if it were "one per cent of all the proximate causes of the accident" barred any recovery by Plaintiff. By contrast, if the Court had instructed the jury that the Reno City Ordinance established only a 25 mile speed limit, then the jury would necessarily have been required to find a speed in excess of that limit before recovery could have been barred on the basis of excessive speed. Thus, the combination of prejudicial errors with respect to instructions on the legal effects of a violation by Defendant Mario Delizio of Reno City Ordinance 10-111, and Francis Cochran's operation

of the Plymouth automobile relating to the state statute dictates that the judgment be reversed and the action remanded for retrial in the interests of justice.

VI. THERE WAS A TOTAL FAILURE BY DEFENDANT TO PLEAD THE AFFIRMATIVE DEFENSE OF PASSENGER CONTRIBUTORY NEGLIGENCE, AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE GIVING OF SAID INSTRUCTION.

Contributory negligence of a passenger must be pleaded as an affirmative defense. F.R.C.P. 8 (c). It is important to note that Defendant in his Answer did not plead contributory negligence on the part of Plaintiff Lois Cochran as a passenger (Tr. of Rec. 7), nor was the matter raised in Defendant's Memorandum of Contentions of Fact and Law (Tr. of Rec. 61), and he did not at any time seek permission from the Court to amend his Answer, and the Court did not do so of its own motion. The issue never was raised at any time during the trial, and the reason therefor is evident from the record—there was insufficient evidence to raise such an issue.

There is no credible evidence in the record of any conduct on the part of Francis Cochran, the driver of the automobile, which would require any affirmative action on the part of Plaintiff. The testimony and physical evidence, as demonstrated by the photographs and the diagram, positively negatives speed on the part of the Cochran automobile. Mr. Cochran testified that he was traveling at a speed of between 20 and 25 miles an hour. (T 278) At the scene of the accident Mr. Cochran told Officer Walen he was going about 25 miles an hour prior

to the accident. (T 25) The reverse side of the Reno City Police Accident Report, Plaintiff's Exhibit 17, shows the speed of the Cochran vehicle at 25 miles per hour. (T 65).

Defendant offered no evidence whatsoever as to any negligent conduct on the part of Lois Cochran. The testimony of Defendant's witnesses as to the speed of the Cochran vehicle is incredible, unbelievable and contradictory. Defendant Delizio testified that the other vehicle was traveling 60 miles per hour or better (T 90), yet immediately thereafter he testified that he *never saw the other vehicle before the collision.* (T 91) From the entire testimony and the physical evidence it is obvious that Mr. Delizio never saw the other car until the collision, as he testified. There was absolutely no way that he could form an estimate of the speed of the Cochran vehicle. Mr. Furry testified that he had no estimate of the speed of the Plaintiff automobile and had no idea how fast it was traveling. (T 200) Ada Schaefer, another passenger in the Delizio vehicle, testified that the Cochran automobile was traveling between 70 and 80 miles an hour. (T 309) This testimony was also unbelievable and incredible inasmuch as she later testified *she had no idea how fast the other car was going.* (T 322) Helen Furry testified she could not give an estimate as to the speed of the Cochran vehicle. (T 211)

In addition to not pleading contributory negligence on the part of the Plaintiff passenger, it should also be noted that counsel for Defendant did not even mention the subject in his closing argument. In fact in his argument he even admitted that the estimates of speed by Mr. Delizio and Ada Schaefer did not make any sense and were not true:

"Mr. Delizio, he said at least 60 miles an hour. That can't possibly be true.

* * * *

"Ada Schaefer said 70 to 80. She doesn't even drive an automobile. She can't possibly be making a reasonable estimate. It doesn't make any sense." (T 2A 37)

Plaintiff respectfully submits that there simply was no credible evidence to support the giving of the instruction on contributor negligence on the part of the Plaintiff passenger and the giving of such an instruction constitutes reversible error.

Schafer v. Gilmer, 13 Nev. 330 (1878) held:

"It is a well settled principle of law that the instructions given must be considered with reference to the pleadings and the evidence. In this case the question of contributory negligence is not raised in the pleadings, and no testimony was offered that would authorize its consideration by the jury."

Contributory negligence is an affirmative defense which must be specifically pleaded and proved by a preponderance of the evidence. *Wells, Inc. v. Shoemake,* 64 Nev. 57, 177 P.2d 451 (1947).

In *Devine v. Cook,* 3 Utah 2d 134, 279 P.2d 1073 (1955), supra, plaintiffs contended that the trial court committed error in instructing the jury on the issue of contributory negligence of the plaintiffs, both of whom were passengers. The Supreme Court first noted that defendants did not plead contributory negligence on the part of the passengers and it was only after the case had been tried and after the court had indicated the instructions were to be given that the pleadings were permitted to be amended

so as to raise the issue. The Court then stated, at p. 1078: "The law is amply clear that where there is no evidence of contributory negligence the jury should not be instructed on such issue."

The Court then quoted and cited from numerous decisions, in all of which the giving of a similar type instruction constituted prejudicial error. The Court then held, at p. 1079:

> It is therefore apparent in this case the pleadings and evidence did not warrant or support the instructions on contributory negligence of the plaintiffs Mrs. Devine and Mrs. Gusinda, and the giving of said instructions was error.

Ordinarily the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented. *Bartek v. Glasers Provisions Co.,* supra, 160 Neb. 794, 71 N.W.2d 466 (1955), holding that in a factual situation virtually identical to the present case it would have been error for the court to have submitted an instruction on contributory negligence of the passenger. See also *Robinson v. Cable,* 359 P.2d 929 (Cal. 1961).

Contributory negligence must be set up as an affirmative defense, and the burden of proving it by a preponderance of the evidence is on the defendant. *There must be substantial evidence of negligence—a scintilla of evidence will not do. Liesey v. Wheeler,* 60 Wash.2d 209, 373 P.2d 130 (1962).

In *Conroy v. Perez,* 148 P.2d 680 (Cal. 1944), defendant asked for leave of court to amend his answer to set

up the defense of contributory negligence, which application was made just before defendants called their last witness. Leave was granted but defendants never did file an amended pleading. The Court held, at p. 686:

> In the foregoing state of the record the trial court was justified in concluding that plaintiff was entitled to a new trial either upon the ground that no issue of contributory negligence on the part of the child's father had been pleaded, and that therefore the instructions given on that defense were improper; or upon the ground that under all the circumstances it was error for the court to grant leave to amend at the end of the trial so as to bring in a new defense.

The giving of an instruction on the issue of contributory negligence when not pleaded as an affirmative defense is reversible error. *Hancock v. Thigpen,* 256 P.2d 428 (Okla. 1953).

It is well settled that contributory negligence to be an issue must be pleaded, and it is waived unless pleaded. *Provost v. Worrall,* 142 C.A.2d 367, 298 P.2d 726 (1956); *Greene v. M. & S. Lumber Co.,* 108 C.A.2d 6, 238 P.2d 87 (1951).

Plaintiff respectfully submits that in view of Defendant's failure to plead contributory negligence of Plaintiff as a passenger, and the issue never having been raised at any time during the pendency of the action, and mentioned for the first time after trial, during the settling of instructions, together with the total lack of credible evidence of contributory negligence as a passenger, the giving of said instruction was prejudicial and reversible error.

VII. THE COURT ERRED IN ADMITTING EVIDENCE OF A CLAIM MADE BY DEFENDANT'S PASSENGER ADA SCHAEFER AGAINST PLAINTIFF AND HER HUSBAND AND THAT THE CLAIM HAD BEEN CLOSED.

Ada Schaefer, a passenger in the Defendant Delizio's automobile, testified, over objection (T 261), that she received certain personal injuries in the accident out of which Plaintiff's suit arose, and that she had made a claim against Mr. and Mrs. Cochran, which was closed. (T 310-311)

This testimony clearly is irrelevant, immaterial and directly prejudiced Plaintiff, the impact of the testimony being that Plaintiff was at fault. The law is well established that such evidence is inadmissible and constitutes prejudicial and reversible error.

A case directly in point is *Schenker v. Bourne,* 102 N.Y.S.2d 928 (N.Y. 1951), involving an action for personal injuries sustained in an automobile collision. The trial court admitted evidence that two persons, not parties to the present suit, had instituted actions against the plaintiff, which had been settled and discontinued before the present trial. The appellate court reversed the judgment for defendant, holding that the above evidence could serve no legitimate purpose and was prejudicial to plaintiff's case.

Another case directly in point is *Ross v. Fishtine,* 227 Mass. 87, 177 N.E. 881 (1931), also involving an action for personal injuries resulting from an automobile collision resulting in a verdict for plaintiff. During the trial defendant made an offer of proof that plaintiff, or someone in his behalf, had paid certain sums of money to

defendant and the passengers in defendant's car. The trial court rejected the offer of proof and was affirmed by the appellate court, holding at p. 811:

> Nor did the evidence offered tend to prove an admission by the plaintiff that his negligence was a contributing cause of the collision. It shows no more than a compromise of the claims of the defendant and the occupants of his automobile—a purchase of peace by the plaintiff. There is no evidence in the record from which a different meaning of the payments can be inferred. These payments stand no better as admissions than would offers of compromise, which, of course, are inadmissible.

Ada Schaefer is in exactly the same position as the passengers in the defendant Fishtine's automobile above, and the admission in evidence of her claim against Mr. and Mrs. Cochran was clearly inadmissible and prejudicial.

Plaintiff submits that the decision in *Meek v. Miller*, 1 F.R.D. 162 (D.Ct. Penn. 1940), is squarely in point and requires reversal. The *Meek* case was an action for personal injuries resulting from an automobile collision involving the cars of plaintiff and defendant. In his answer, defendant asserted the following affirmative defense:

> Claims were made by the defendant and his wife, who was an occupant in his automobile, against the plaintiff for injuries and damages sustained in said accident by the defendant and his said wife, due to the negligence of the plaintiff herein. The said claims were referred by the plaintiff herein to his indemnifying insurance company, which said company paid the claims of the defendant and his said wife for and on behalf of the plaintiff, the plaintiff thereby ad-

mitting negligence and responsibility for said accident.

Plaintiff's motion to strike the affirmative defense was granted, the Court holding, at p. 163:

> Assuming the assertions of defendant's paragraph 12 can be proved, the matter set forth therein would not be admissible in evidence. The fact that plaintiff's insurance company paid defendant's claims against plaintiff does not show an admission of liability by the plaintiff. It shows only a compromise of defendant's claims against plaintiff. Such payment stands in no better position as evidence than an offer of compromise, which latter is inadmissible as proof of admission of liability. (citing cases) It will not help defendant's case in any particular if he could prove such statement, but on the other hand, *to allow the contested allegation to remain in the pleadings might result in prejudice to the plaintiff.* (Emphasis added.)

The above case was before the Appellate Court again, *Meek v. Miller,* 38 F.Supp. 10 (D.Ct. Penn. 1941), following the trial thereof which resulted in a verdict for defendant. Plaintiff moved for a new trial on the grounds that defendant had elicited, on cross-examination, virtually the same information which had been ruled upon as inadmissible in the earlier *Meek* case. The substance of the information sought to be elicited by counsel for defendant implied that plaintiffs were to blame for the accident. The Court pointed out that the question asked by defense counsel was not completed and no answer was given, yet the statement of defendant's counsel in the hearing of the jury clearly brought to their attention the purpose of the question together with a clear implication

of the anticipated answer that plaintiff's insurance company had determined plaintiff was at fault. After referring to its previous decision, quoted above, the Court held, at p. 12:

> The jury might, therefore, draw the inference that plaintiff's insurance company had placed the blame on plaintiff, and had paid defendant's claims. *This was exactly the irrelevant and prejudicial information which the Court had sought to forestall in its order striking out the 12th paragraph of the affidavit of defense.* (Emphasis added.)

The verdict for defendant was reversed and a new trial ordered.

If, as in the *Meek* case, a mere *inference* that a claim was made against a plaintiff, indicating fault, constitutes prejudicial and reversible error, certainly the actual *testimony* as to such a claim constitutes prejudicial error.

The law is well established that where a settlement is made by way of compromise with a third person not a party to the suit, arising out of the same transaction or incident, evidence of the settlement with that third party is clearly irrelevant and is not admissible in evidence. *Brown v. Pacific Electric Ry. Co.*, 180 P.2d 424 (Cal. 1947); *Baesens v. New York Cent. R. Co.*, 193 N.Y.S. 720 (1922); *Cochrane v. Fahey*, 245 App. Div. 41, 280 N.Y.S. 622 (1935); see also Annot., "Admissibility of Evidence That Defendant in Negligence Action Has Paid Third Persons on Claims Arising From the Same Transaction or Incident as Plaintiff's Claim," 20 A.L.R.2d 304.

CONCLUSION

Appellant respectfully requests that the judgment herein be reversed and the cause remanded for a new trial.

Dated, Reno, Nevada,
May 10, 1968.

Respectfully submitted,
RICHARD P. WAIT,
ROGER L. ERICKSON,
LAW OFFICES OF RICHARD P. WAIT,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD P. WAIT

(Appendix Follows)

Appendix

Appendix

LIABILITY OF MOTOR VEHICLE OWNER FOR NEGLIGENT OPERATION BY IMMEDIATE MEMBER OF FAMILY

41.440 Liability of motor vehicle owner for negligent operation by immediate member of family. Any liability imposed upon a wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family arising out of his or her driving and operating a motor vehicle upon a highway with the permission, express or implied, of such owner is hereby imposed upon the owner of the motor vehicle, and such owner shall be jointly and severally liable with his or her wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family for any damages proximately resulting from such negligence or willful misconduct, and such negligent or willful misconduct shall be imputed to the owner of the motor vehicle for all purposes of civil damages.

(Added to NRS by 1957, 60)

41.450 Operator to be made party defendant; recourse on recovery of judgment. In any action against an owner on account of imputed negligence as imposed by NRS 41.440, the operator of the motor vehicle whose negligence is imputed to the owner shall be made a party defendant if service of process can be had upon the operator as provided by law. Upon recovery of judgment, recourse shall first be had against the property of the operator so served.

(Added to NRS by 1957, 61)

41.460(2)(b) "Owner" has only the significance attributed to it by NRS 41.440.

COURT'S INSTRUCTIONS

The following instructions were all inserted by the Court, at the beginning of the instructions, between written and offered instruction four and written and offered stock instruction six:

The defendant claims contributory negligence and to establish the defense of contributory negligence the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff or the driver of the car in which the plaintiff was riding, that is, her husband, was negligent, and that such negligence contributed as a proximate cause of the injury.

If you find there was any negligence on the part of Francis Cochran, the husband and driver of the car, which proximately contributed to the collision, such negligence is deemed to be the negligence of the plaintiff in this case.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff herself, or the driver of the car in which she was riding, was a proximate cause of any injuries and consequent damage which the plaintiff may have sustained. Contribu-

tory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the defendant in effect alleges that even though the defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff herself or her husband by her failure or his failure to use ordinary care—and that term will be defined to you in a moment—under the circumstances for her own safety at the time and place in question also contributed as one of the proximate causes of any injuries and damages the plaintiff may have suffered.

The burden is on a defendant alleging the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim that the plaintiff herself or the driver of the car, her husband, was also at fault and that such fault contributed one of the proximate causes of any injuries and consequent damages plaintiff may have sustained.

The issues to be determined by the jury in this case are these:

First: Was the defendant negligent?

If your unanimous answer to that question is "No," you will return a verdict for the defendant; but if your unanimous answer is "Yes," you then have a second issue to determine, namely:

Second: Was the negligence of the defendant a proximate cause of any injury or damage to the plaintiff?

If your unanimous answer to that question is "No," you will return a verdict for the defendant: but if your unanimous answer is "Yes," then you must find the answer to a third question, namely:

Third: Was the plaintiff or her husband guilty of any contributory negligence?

If you should unanimously find that he or she was not, then, having found in plaintiff's favor in answer to the first two questions, you will determine the amount of plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you should unanimously find, from a preponderance of the evidence in the case, that the plaintiff or her husband was guilty of some contributory negligence, and that plaintiff's or her husband's fault contributed as a proximate cause of any injuries which plaintiff may have sustained, you will not be concerned with the issues as to damages, but will return a verdict for the defendant.

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you will find the same to be not true.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant. (T 422-426)

EXHIBITS

		Identified	Received
Plaintiff's Exhibit	1	Tr. of Rec. 96	Tr. of Rec. 96
" "	2	" " "	" " "
" "	3	" " "	" " "
" "	4	" " "	" " "
" "	5	" " "	" " "
" "	6	" " "	" " "
" "	7	" " "	" " "
" "	16	T 9	T 37
" "	16A	T 37	T 37
" "	17		T 62
Defendant's Exhibit	A	T 39	
" "	B	T 39	

Note: Defendant's Ex. A. for Identification, and Plaintiff's Ex. 17 in evidence are the same document.

No. 22,302

United States Court of Appeals

For the Ninth Circuit

LOIS COCHRAN,

Appellant,

vs.

MARIO DELIZIO,

Appellee.

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

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Attorneys for Appellee.

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No. 22,302

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APPELLEE'S ANSWERING BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an action which originated in the Nevada State Courts by the filing of the Complaint (Tr. of Rec. 187-189) in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe and which was transferred by Petition for Removal (Tr. of Rec. 184-186) to the United States District Court for the District of Nevada in Reno, Nevada, pursuant to 28 U.S.C., Sec. 1332, and 28 U.S.C., Sec. 1441, on behalf of Defendant Mario Delizio, on the basis of diversity of citizenship, and

that the matter in controversy exceeded the sum of $10,000.00. The U.S. District Court had jurisdiction by reason of Plaintiff's citizenship in the State of Nevada and the citizenship of Defendant Mario Delizio in the State of California. A jury was demanded by Defendant.

The appeal is taken by the Plaintiff as a matter of right under the provisions of 28 U.S.C., Sec. 1291, being an appeal from a final decision of a Federal District Court.

STATEMENT OF THE CASE

This is an action for personal injuries suffered by Plaintiff Lois Cochran arising from an automobile collision which occurred in the City of Reno, State of Nevada, at approximately 3:30 to 4:00 p.m. (T 176) on September 25, 1965, at the intersection of West Street and West Fifth Street (T 8). Plaintiff was a passenger in the right front seat of a 1964 Plymouth Fury automobile operated by her husband Francis Cochran. (T 118-119.)

The Plaintiff finished working that day at 3:15 p.m. at Washoe Medical Center (T 175), drove three miles to her home, changed clothes, then entered the vehicle driven by her husband and they were on their way to Sparks, Nevada to attend a wedding reception already in progress when the accident occurred (T 176). Plaintiff sustained superficial injuries to her right hip, shoulder, neck, right arm and right leg. (T 123.)

The Defendant Mario Delizio was operating a 1953 Ford automobile. (T 58.) There were four passengers in his car, Mrs. Helen Furry, seated in the middle front seat (T 109), Mrs. Ada Schaefer, seated in the right front seat (T 306), Mr. Leon Furry, seated in the left rear seat (T 196), and Adolf Deering, seated in the right rear seat (T 196). The Defendant's destination was his home in Greenville, California. (T 77-78.)

The Plaintiff's 1964 Plymouth Fury was travelling in the outer lane of Fifth Street in an easterly direction. (T 119.) Fifth Street was a four-lane, through street, with two lanes for eastbound traffic and two lanes for westbound traffic, measuring a total of approximately 56 feet wide. (T 10.) The two eastbound lanes were approximately 27 feet wide. (T 13.) West Street, a north-south intersecting street, was approximately 55 feet wide. (T 13.) The Defendant was travelling north on West Street. Fifth Street on the east side of its intersection with West Street is offset approximately 19 feet to the south. (T 11.) This offset requires an eastbound driver on Fifth Street to turn to the right at West Street sufficiently to move 19 feet to the right as he traverses the intersection in order to maintain the same position in the outside or right-hand lane of traffic on Fifth Street. (T 287.) There was a stop sign on West Street, the street on which Defendant Delizio was travelling, as it intersected with Fifth Street. (T 14.)

It was a clear day, the streets were dry, and visibility was good. (Exhibit 16-A.) There were no ob-

structions on the southwest corner of the intersection and the view of each driver was equally clear. (T 24-25, 56, 91-92, 281, 284.)

The Defendant Delizio came to a complete, dead stop before reaching the crosswalk on the south side of Fifth Street on West Street. (T 83, 86.) This fact was confirmed by the observations and direct testimony of the passengers in his vehicle, Leon Furry (T 197), Helen Furry (T 209-210), and Ada Schaefer (T 30, 307, 308). Mr. Delizio looked to his left and to his right before he proceeded into the intersection. (T 84-85.) This was confirmed by the observation and direct testimony of the passenger Helen Furry. (T 210.) He could see a good one-half block to his right and there was no traffic coming. (T 86.) He could see a good half block to his left while stopped and there was no traffic coming. (T 86, 90.) After being assured that the road was completely clear, the Defendant proceeded slowly into the intersection in second gear. (T 86, 111-112.) The fact that he was proceeding slowly into the intersection was confirmed by the observation and direct testimony of the passenger Helen Furry (T 223) and the passenger Ada Schaefer (T 322). The Defendant was travelling between 5 and 10 mph at the time of the impact and reached a maximum of 10 mph prior to impact. (T 90, 113.) This is corroborated by the testimony of the passengers that the Delizio automobile was travelling slowly from the complete stop when the accident occurred. (Leon Furry (T 199); Helen Furry (T 220, 222); Ada Schaefer (T 322).)

The Defendant Delizio had proceeded, from the point where he had stopped, approximately 10 feet through the crosswalk (T 41) and 25 feet further to the point of impact (T 15-16, and Exhibits 16 and 16-A). Thus, the Defendant Delizio had proceeded a total distance of approximately 35 feet from the point at which he had stopped for the stop sign to the point of impact.

The Defendant having travelled from a speed of 0 to a maximum of 10 mph at the point of impact, a reasonable inference is that his average speed during the distance travelled of 35 feet was 5 miles per hour. The vehicle in which the Plaintiff was riding was reported to have been travelling at 25 mph at the point of impact. (T 51-52, 59, and Exhibit 16-A.) Thus, the Cochran vehicle was travelling five times as fast as the average speed at which the Defendant Delizio's automobile was travelling. Accordingly, while the Defendant Delizio was travelling a distance of 35 feet, the Cochran vehicle, inferentially, travelled approximately five times that far, or a total of 175 feet. Under these circumstances, the Cochran vehicle was in excess of one-half block to the west of the point of impact when the Defendant Delizio looked at the road to his left, saw no traffic within one-half block, and then proceeded into the intersection.

The driver of the Cochran vehicle, Francis Cochran, testified that the intersection was known to him to be one which required "watching where you were going", but that he "wasn't noticing" and "a car just hit me right on the side." (T 278 and 284.) During the

entire block approaching the intersection he was aware that he was approaching a cross street (T 279) and that there might be cars proceeding north across that intersection (T 280). He testified that he did not look for northbound traffic as he approached the intersection and did not see Mr. Delizio's automobile until they were both in the intersection (T 285, 286), even though he could see cars stopped at that intersection on West Street facing north. (T 281, 284, second page so numbered.)

Although the driver of the Cochran vehicle was not distracted (T 295), there were no physical obstructions to his vision (T 295), and there were no defects in his windshield (T 296), he did not see the Defendant's vehicle prior to impact (Exhibit 16-A, T 52-54, 150, 278). This fact is corroborated by the fact that there were no skid marks left by the Cochran vehicle prior to impact. (T 20, 41-42.) There was no physical evidence or visible evidence of any kind to suggest that the driver of the Cochran vehicle applied his brakes, attempted to slow down or stop the vehicle, or change the direction of its travel prior to impact. (T 41-42.) In spite of the fact that the driver of the Cochran vehicle did not see the Delizio vehicle prior to impact (T 71), he accused the Defendant Delizio of failing to stop at the stop sign which was immediately denied by both the Defendant Delizio (T 115-116, 203) and the witness Ada Schaefer (T 310).

The driver of the Cochran vehicle also testified that as he entered the intersection of Fifth Street and West Street, he intended to turn to the right in order

to travel 19 feet south as he travelled through the intersection in order to stay in the outside lane of Fifth Street. (T 287.) In fact, he did turn to the right on the day of the accidently directly into the path of the Defendant Delizio's vehicle. (T 289, 290.)

The Plaintiff riding in the front seat of the Cochran vehicle did not see the Defendant Delizio's vehicle until the Cochran vehicle was two-thirds of the distance through the intersection. (T 144.)

At impact, the Delizio automobile did not proceed forward any distance but was pulled to the right by the force of the Cochran vehicle a total of 7 feet 5 inches. (T 16, 40, 201.) The Cochran vehicle proceeded on past the point of impact a total of almost 47 feet, almost seven times the distance travelled by the Defendant's vehicle. (T 40-41, Exhibit 16-A.)

The evidence established that the Cochran vehicle was exceeding the speed limit of 25 miles per hour. The Defendant Delizio testified that the Cochran vehicle was going "pretty fast, 60 is the number or better. It was pretty fast." This was corroborated by Helen Furry (T 211), and Ada Schaefer (T 309). Any speed in excess of 25 mph would necessarily mean that the Cochran vehicle was in excess of 175 feet from the point of impact when the Defendant Delizio first proceeded into the intersection. The Defendant Delizio saw the Cochran vehicle when it was approximately 10 feet away (Exhibit 16-A, T 51), and applied his brakes and tried to stop, but it was too late (T 105, 331).

The Plaintiff, Lois Cochran, testified that the 1964 Plymouth Fury automobile involved in the accident was registered with the Department of Motor Vehicles of the State of Nevada showing the legal owners as "Francis or Lois Cochran" (T 169), that Francis Cochran was driving the vehicle with her consent (T 169), and that she and Francis Cochran were husband and wife and living in the same household (T 170). There was no evidence offered by the Plaintiff to rebut the legal presumption that the automobile was owned in joint tenancy by the Plaintiff and her husband, Francis Cochran, and that she could transfer the legal title to the automobile on her sole signature as the legal owner.

On Thursday, June 29, 1967, the case was thoroughly argued by counsel on behalf of the Plaintiff and the Defendant. (T 2A, 4-57.) The jury was fully instructed by the Court. (T 420-444.) The jury retired from the Courtroom at 2:20 p.m. and returned to the Courtroom at 3:25 p.m. with a verdict for the Defendant and against the Plaintiff. (T 445-448.)

Plaintiff made no motion for a new trial before the trial judge, the Honorable Pierson M. Hall, District Judge, presiding.

Appellee will answer the specifications of errors and argument of Appellant jointly in the order presented by Appellant and will then present Appellee's authorities in support of the Judgment appealed from.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT ANY NEGLIGENCE OF PLAINTIFF'S HUSBAND AS DRIVER OF THE CAR WAS IMPUTABLE TO PLAINTIFF.

The uncontradicted evidence established that the 1964 Plymouth Fury in which the Plaintiff was riding was being operated by her husband, Francis Cochran, with the permission of the Plaintiff, and that the records of the Motor Vehicle Department of the State of Nevada established that the registered and legal owners of the automobile were "Francis Cochran or Lois Cochran." The evidence therefore established without contradiction that this case was directly within the provisions of a Nevada statute in force at the time of the accident which required that the negligence of Francis Cochran be imputed to Lois Cochran as an owner of the 1964 Plymouth Fury. Nevada Revised Statutes Sec. 41.440 provided as follows:

> "Any liability imposed upon a wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family arising out of his or her driving and operating a motor vehicle upon a highway with the permission, express or implied, of such owner is hereby imposed upon the owner of the motor vehicle, and such owner shall be jointly and severally liable with his or her wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family for any damages proximately resulting from such negligence or wilful misconduct, *and such negligent or wilful misconduct shall be imputed to the owner of the motor vehicle for all purposes of civil damages.*" (Emphasis added.)

This statutory enactment by the Nevada State Legislature became effective July 1, 1957. It is not a judicial expression of a rule of law known as the "Family Purpose Doctrine." Accordingly, the cases relied upon by Appellant which refer to the judicially created "Family Purpose Doctrine" have no application in the consideration of this case.

In 1935, the State of California enacted a statute imposing liability on the owner of a motor vehicle for the negligence of a permissive driver in the following language:

> "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by a person using or operating the same with the permission, express or implied, of the owner." (Vehicle Code, Section 402.)

In 1937, the statute was amended to add the following language:

> "*. . . and the negligence of such person shall be imputed to the owner for all purposes of civil damages.*" (Vehicle Code, Section 402; emphasis added.)

The California Supreme Court was called upon to interpret this amendment and decide whether or not the statute would impute the negligence of the operator to the owner so as to bar any recovery by the owner against a third person. The California Supreme Court unanimously held that the statute quoted above exprssly required the imputation of the negligence of the operator to the owner so as to bar re-

covery by the owner against the third party. *Milgate v. Wraith,* 19 Cal.2d 297, 121 P.2d 10 (1942). The California Supreme Court stated as follows:

> ". . . The phrase 'the negligence of such person shall be imputed to the owner for all purposes of civil damages' can be interpreted in no other sense than to include actions by the owner against third persons. Indeed that was undoubtedly the very purpose of the amendment." (121 P.2d at 11.)

The California Supreme Court further quoted from the trial court as follows:

> ". . . 'Its purpose, then, would seem to be that which its wording is sufficiently comprehensive to cover, namely, the imputation of such negligence in all cases where the rights and obligations of the owner are involved in civil actions for damages. Its only effect, which may also be considered its purpose, was to definitely extend the imputation to actions in which the owner sought redress in damages.' " (121 P.2d at 11.)

It should be noted that the language of the Nevada imputation statute is almost precisely identical with the language of the California imputation statute referred to in the California Supreme Court decision.

The California Supreme Court decision in *Milgate v. Wraith, supra,* has been followed in numerous cases, including *Dorsey v. Barba,* 38 Cal.2d 350, 240 P.2d 604 (1952); *Birnbaum v. Blunt,* 152 C.A.2d 371, 313 P.2d 86 (1957); *Rody v. Winn,* 162 C.A.2d 35,

327 P.2d 579 (1958); *Lambert v. Southern Counties Gas Co.,* 340 P.2d 608 (Calif. 1959); *Zabunoff v. Walker,* 192 C.A.2d 8, 13 Cal. Rptr. 463 (1961).

In *Mooren v. King,* 182 C.A.2d 546, 6 Cal. Rptr. 362 (1960), the Appellate Court affirmed a judgment against the wife based upon the imputation of the negligence of the husband to the Plaintiff wife and stated as follows:

> ". . . moreover, in the case at bar the automobile operated by Mr. Mooren was owned jointly by him and his wife. There is no showing that it was community property. These circumstances would foreclose recovery by the wife in the event her husband was contributively negligent, independent of their husband and wife relationship. Under Section 17150 of the Vehicle Code, formerly Section 402, the negligence of the operator of an automobile is imputed to the owner thereof for all purposes of civil damages. *Milgate v. Wraith,* 19 Cal.2d 297, 299, 121 P.2d 10; *Spendlove v. Pacific Electric Ry. Co.,* 30 Cal.2d 632, 634, 184 P.2d 873."

The evidence in the trial of this action established without dispute that the automobile was owned by the Plaintiff and her husband as joint tenants. In this regard, the legal ownership as registered with the Department of Motor Vehicles determines the ownership of the vehicle. See Nevada Revised Statutes Section 482.400 which provides in part as follows:

> "1. . . . upon a transfer of the title or interest of a legal owner or owner in or to a vehicle reg-

istered under the provisions of this chapter, the person or persons whose title or interest is to be transferred and the transferee shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, together with the residence address of the transferee, in the appropriate spaces provided upon the reverse side of the certificate.

2. Immediately thereafter the transferee shall apply for registration as provided in N.R.S. 482.-215, . . ."

Nevada Revised Statutes Section 482.410 provides as follows:

"Upon receipt from the transferee of the certificate of ownership properly endorsed, the certificate of registration of the vehicle, the application, the privilege tax and the registration fee the department shall register such vehicle as provided in this chapter with reference to an original registration, and shall issue to the owner and legal owner entitled thereto, by reason of such transfer, a new certificate of registration, a new license plate or plates, and a new certificate of ownership, respectively, in the manner and form provided in this chapter for original registration."

Thus, the ownership certificate issued by the Department of Motor Vehicles of the State of Nevada is *the* indicia of title and is not merely evidence of the ownership of the vehicle. Here, the Plaintiff, Lois Cochran, with her sole signature could transfer the absolute ownership of the vehicle without the signa-

ture of her husband, Francis Cochran. This establishes conclusively that she was an *owner* of the vehicle within the express language of Nevada Revised Statutes Section 41.440 requiring the imputation to her of the negligence of her husband, a permissive driver, *for all purposes of civil damages.*

Appellant, at pages 28-29 of the Opening Brief, asserts that the Nevada law is clear that Lois Cochran's cause of action for personal injuries was her separate property and that her husband's negligence is not imputable to her regardless of the form of ownership of the automobile. In a grand *non sequitur* the Appellant then concludes that "N.R.S. 41.440 clearly is inapplicable and has nothing to do with the situation presented herein, as is evidenced by the Nevada authorities cited above." It is Appellee's contention that not one of the cases cited by Appellant supports this conclusion.

In the first place, the character of the Plaintiff's recovery, i.e., separate or community property, was never an issue in this case and the cases dealing with this problem are irrelevant. Thus, *F. & W. Construction Co. v. Boyd,* 60 Nev. 117, 102 P.2d 627 (1940) merely held that the negligence of the husband could not be imputed to the wife solely by reason of the character of the wife's recovery of damages. In other words, the court held that the damages recovered by the wife would be her separate property rather than her community property and that the husband's negligence would not be imputed on the basis that he would share in the proceeds.

Secondly, the *case law* in the State of Nevada concerning the imputation of negligence prior to the enactment of N.R.S. 41.440 has no application to an action falling within the provisions of the *statute,* N.R.S. 41.440.

Appellant makes reference to *Lee v. Baker,* 77 Nev. 462, 366 P.2d 513 (1961). The accident which gave rise to this case occurred on May 9, 1957. The Nevada statute, N.R.S. 41.440, became effective July 1, 1957. Accordingly, the statute was not alleged in the Defendant's Answer and there was no issue concerning the ownership of the vehicle or the imputation of negligence of the driver to the owner under the statute which became effective after the accident occurred. For these reasons, this opinion of the Nevada Supreme Court cannot be considered authority of any kind concerning the legal effect of the statute in question.

Likewise, in *Cook v. Faria,* 74 Nev. 262, 328 P.2d 568 (1958) the accident which gave rise to the suit occurred on October 30, 1953, almost four years prior to the enactment of the statute. The opinion cited by Appellant at 74 Nev. 262, 328 P.2d 568 (1958) clearly discloses that the case was previously before the Nevada Supreme Court. The citation of the prior appellate decision is given as 73 Nev. 295, 318 P.2d 649 (1957). The prior opinion shows that the accident occurred on October 30, 1953. Appellant not only fails to disclose this fact to this Appellate Court, but attempts to argue by innuendo that the Nevada Supreme Court in its opinion of August 11, 1958, by

implication *holds* that N.R.S. 41.440 does not require imputation of negligence to the owner-wife.

In *Morrissett v. Morrissett,* 80 Nev. 566, 397 P.2d 184 (1964), the Nevada Supreme Court held that the inter-spousal immunity at common law is likewise in force in the State of Nevada. The reference by Justice Thompson to the imputation of negligence occurred in a *dissenting* opinion and related only to the separate porperty character of the wife's recovery.

King v. Yancey, 147 F.2d 379 (9th Cir. 1945) was decided before the enactment of N.R.S. 41.440 and was based upon the Nevada case law concerning the separate property character of the wife's recovery.

Likewise, the statement in the annotation at 35 A.L.R.2d 1199, 1231, concerns the character of the spouse's recovery and refers to the Nevada case law prior to the enactment of the statute.

Finally, Appellee can affirmatively demonstrate that the Nevada Supreme Court has not ruled on the imputation of negligence under N.R.S. 41.440 by quoting the following language from an opinion of the Nevada Supreme Court in *Wilson v. Perkins,* 82 Nev. 42, 409 P.2d 976 (1966):

> "Since we uphold the jury's determination that there was no contributory negligence that proximately led to the accident, we need not decide appellant's second specification of error concerning imputation of negligence to the wife as an owner of the vehicle under N.R.S. 41.440." (409 P.2d at 977)

The decisions cited by Appellant from jurisdictions other than Nevada and California deal with cases in-

volving either no statute at all or statutes dissimilar to the California and Nevada enactments. Accordingly, these cases provide no support whatever to Appellant's position.

In *Bartek v. Glasers Provisions Co.,* 160 Neb. 794, 71 N.W.2d 466 (1955) there was no statute whatever and the court was dealing with the family purpose *doctrine.* Accordingly, the case has no application here.

Likewise, *Brower v. Stolz,* 121 N.W.2d 624 (N. Dak. 1963) and *Michaelsohn v. Smith,* 113 N.W.2d 571 (N. Dak. 1962) both involved the family purpose *doctrine* and did not interpret a statute.

Neither the Iowa statute involved in *McMartin v. Saemisch,* 116 N.W.2d 491 (Iowa 1962) nor the Minnesota statute involved in *Christensen v. Hennepin Transp. Co.,* 215 Minn. 394, 10 N.W.2d 406 (1943) contained any language similar to the Nevada statute, N.R.S. 41.440, or the California statute, Vehicle Code, Section 402, subsequently changed to Section 17150. Accordingly, the *McMartin* case and the *Christensen* case are not authority of any kind for Appellant's contention that the Nevada statute does not require imputation of contributory negligence to the owner.

Jacobsen v. Dailey, 36 N.W.2d 711 (Minn. 1949) merely follows the *Christensen* case, *supra,* and does not involve a statute similar to the Nevada or California statute.

In *Universal Underwriters Insurance Co. v. Hoxie,* 375 Mich. 102, 133 N.W.2d 167 (1965), the court was concerned with a statute which has no language re-

motely similar to that contained in the Nevada statute and the California statute quoted hereinabove.

Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540 (Minn. 1966) did not involve any statute whatever.

Jasper v. Freitag, 145 N.W.2d 879 (N. Dak. 1966) did not involve any statute whatever.

Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (1941) merely held that the language of the New York statute did not contain any language which would require the extension of the statutory imputation of liability to include the contributory negligence of the driver to the owner.

New York Telephone Co. v. Scofield, 31 N.Y.S.2d 393 (1941) and *Petro v. Eisenberg,* 207 Misc. 380, 138 N.Y.S.2d 705 (1955) merely followed the *Jenks* case, *supra.*

The Court should note that the California statute requiring imputation of negligence to the owner for all purposes of civil damages was enacted in 1937. The Nevada State Legislature must be deemed to have been aware of this statutory provision of its neighboring state when it enacted N.R.S 41.440 twenty years later in 1957. Likewise, the Nevada Legislature should be deemed to have been aware of the California decisions such as *Milgate v. Wraith, supra,* when it expressly provided that the negligent or wilful misconduct of the driver "*shall* be imputed to the owner of the motor vehicle for *all* purposes of civil damages." (Emphasis added.) Appellee respectfully suggests that this Court should not ignore or judicially

repeal the obvious intention of the Nevada State Legislature expressed in the clear language of this statute.

In view of the uncontradicted evidence before the trial court and the clear language of the statute, the trial court did not err in instructing the jury that any negligence of the Plaintiff's husband as permissive driver of the car was imputable to the Plaintiff.

II. THE COURT'S INSTRUCTIONS ON THE DEFINITION AND SUBJECT OF CONTRIBUTORY NEGLIGENCE WERE NOT PREJUDICIAL ERROR.

A. Appellant Did Not Object to the Court's Proposed Instruction Defining Contributory Negligence As Required by F.R.C.P. 51.

During the settling of instructions, the trial court advised counsel as follows:

> "So I will give 73.18 of Mathes, 73.21 and 73.23.
>
> Mr. Richards Wait: Your Honor, at what stage under your procedure are we expected to make formal exceptions?
>
> The Court: *Right now* as we go along, as I pass each instruction.
>
> Mr. Richard Wait: Because, you see, I don't have the Mathes book and I have assumed that I should examine this and make a record of it at the end.
>
> The Court: You can come down here early in the morning and take a look at it.
>
> Mr. Richard Wait: *I would be glad to do that.*"
>
> (T 385) (Emphasis added).

The Court was making reference to a well-known and well-recognized and respected work by the Honorable William C. Mathes, Chief Judge, United States District Court for the Southern District of California and the Honorable Edward J. Devitt, Chief Judge, United States District Court for the District of Minnesota, entitled *Federal Jury Practice and Instructions, Civil and Criminal,* (1965 Ed.).

Instruction No. 73.21 from *Mathes and Devitt* as amended by the Court is in its entirety as follows:

> "In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff herself, or the driver of the car in which she was riding, was the proximate cause of any injuries and consequent damage which the plaintiff may have sustained. Contributory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.
>
> By the defense of contributory negligence, the defendant in effect alleges that even though the defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff herself or her husband by her failure or his failure to use ordinary care—and that term will be defined to you in a moment—under the circumstances for her own safety at the time and place in question also contributed as one of the proximate causes of any injuries and damages the plaintiff may have suffered.

> The burden is on a defendant alleging the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim that the plaintiff herself or the driver of the car, her husband, was also at fault and that such fault contributed one of the proximate causes of any injuries and consequent damages plaintiff may have sustained." (T 423-424.)

This is the instruction in its entirety as revised by the Court and to which counsel for Plaintiff objected as follows:

> "Finally at 73.21 we submit to the court that this is erroneous.
>
> The Court: Which one?
>
> Mr. Richard Wait: The definition of contributory negligence. 73.21. It reads as follows: 'In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, *that some contributory negligence on the part of plaintiff,*' and in this case the court has indicated a modification to read 'the driver'.
>
> The Court: *Some contributory negligence* on the part of the driver of the Cochran automobile?
>
> Mr. Richard Wait: Yes.
>
> Now, Your Honor, that isn't the law. There isn't any case that supports the giving of that instruction, *that there is some contributory negligence.*
>
> The Court: Doesn't it go on there and say that contributory negligence has to be contributed as one of the proximate causes?
>
> Mr. Richard Wait: Yes.

The Court: All right then, that clears it.

Mr. Richard Wait: And we have no instruction that says just some negligence is enough for the plaintiff to recover from the defendant.

The Court: The rest of the instruction clears the matter up. The contributory negligence has to be part of the negligence that contributes to the proximate cause of the accident. Isn't that what it says?

Mr. Richard Wait: *All we need do in this instruction is to eliminate the word some.* The word some is erroneous and we submit it is argumentative and prejudicial to the plaintiff.

The Court: Is that all?

Mr. Richard Wait: Yes, Your Honor." (T 415-416; emphasis added.)

It is obvious from the objection of counsel for Plaintiff that his *sole* objection was to the words "some contributory negligence on the part of the Plaintiff." There was no objection by Plaintiff in any form to that portion of instruction No. 73.21 which reads in part as follows:

"Contributory negligence is fault on the part of the person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the negligence of another, and so helps to bring about the injury."

In spite of the fact that counsel for the Plaintiff made no objection whatever to the above quoted portion of the instruction concerning contributory negligence, Appellant has devoted one entire subsection of the Opening Brief to an argument to the Court that

this portion of the instruction was prejudically erroneous. (Appellant's Opening Brief IIA, pages 32-35.)

Federal Rules of Civil Procedure 51 provides as follows:

> "Instructions to Jury: Objection.
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating *distinctly* the *matter* to which he objects and the *grounds* of his objection." (Emphasis added.)

The law is clear that F.R.C.P. 51 requires a clear and distinct objection to the particular matter objected to in the proposed instructions of the Court and a statement of the grounds of the objection. The reason for the rule is given in 5 *Moore's Federal Practice,* Sec. 51.04, at page 2505 as follows:

> "The rule does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, *as long as it is clear that the trial judge understood the party's position; the purpose of the rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them.*" (Emphasis added.)

In support of this statement, Moore cites the following cases: *Sweeney v. United Feature Syndicate, Inc.,* 129 F.2d 904 (C.C.A.2d, 1942); *Evansville Container Corp. v. McDonald,* 132 F.2d 80 (C.C.A. 6th, 1942); *Williams v. Powers,* 135 F.2d 153 (C.C.A. 6th, 1943); *Alcaro v. Jean Jordeau, Inc.,* 138 F.2d 767 (C.C.A. 3d, 1943); *Swiderski v. Moodenbaugh,* 143 F.2d 212 (C.C.A. 9th, 1944).

With reference to a general objection, 5 *Moore's Federal Practice,* Sec. 5104, page 2505 states as follows:

> "By the same token, a mere general objection is insufficient 'where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge is correct.'" (Citing *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 86 L.Ed. 645 (1943).)

The same work also states as follows:

> "Failure to particularize grounds of objection to instruction to jury so as to give the trial court an opportunity of correcting instruction if erroneous and to advise opposing counsel *precludes review on appeal.*" (5 *Moore's Federal Practice,* Sec. 51.04, page 2505; emphasis added.)

As authority, Moore cites the following cases: *Jack v. Craighead Rice Milling Co.,* 167 F.2d 96 (C.C.A. 8th, 1948) cert. den. 334 U.S. 829, 68 S.Ct. 1340, 92 L.Ed. 1756 (1948); *Hanson v. St. Joseph Fuel Oil and Manufacturing Co.,* 181 F.2d 880 (C.A. 8th, 1950); *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31 (C.A. 7th,

1950); *Hoag v. City of Detroit,* 185 F.2d 764 (C.A. 6th, 1950); *Garland v. Lane-Wells Co.,* 185 F.2d 857 (C.A. 5th, 1951); *Biggans v. Hajoca Corp.,* 185 F.2d 982 (C.A. 3d, 1950).

Subparagraph B of Paragraph II of Appellant's Opening Brief, pages 36-39, is likewise devoted to an argument concerning a portion of the Court's instruction to which no objection was made. In other words, this portion of the Brief is likewise referring to that portion of the instruction from *Mathes and Devitt,* 73.21, which contains the language "cooperates in some degree" and "helps to bring about the injury." Counsel for Plaintiff did not advise the Court that objection was made to this portion of the instruction. Accordingly, the Court had no opportunity to correct the language objected to. For this reason, Appellant is not now in a position to urge to this Court that this portion of the instruction was erroneous.

Appellee does not agree that the instruction No. 73.21 from *Mathes and Devitt* as modified by the Court was prejudicially erroneous or erroneous at all. It is obvious that Appellant has attempted to pick to pieces and quote out of context one small portion of the complete instruction given by the Court. A review of the entire instruction shows that the jury was clearly advised that the contributory negligence in question must have contributed as one of the proximate causes of any injuries and damages the Plaintiff may have sustained. Thus, the instruction as a whole was perfectly proper and not erroneous in any respect. See *Freeman v. Churchill,* 30 Cal.2d 453, 183 P.2d 4

(1947); *Polk v. Los Angeles,* 26 Cal.2d 519, 159 P.2d 931 (1945); *Warren v. P.I.E. Co.,* 183 C.A.2d 155, 6 Cal. Rptr. 824 (1960); *Koch v. Denver,* 24 Colo. App. 406, 133 Pac. 1119 (1913).

Subparagraph C of Paragraph II of Appellant's Brief at pages 39-41 asserts that the reference in Defendant's argument to "one percent of the proximate causes" on the part of Mr. Cochran was prejudicial misconduct and reversible error. A close scrutiny of the transcript Volume 2A, page 44, line 15 to page 47, line 2, shows that the only objection made to Defendant's argument was that the word "proximate" had been omitted. When this oversight was pointed out to counsel for Defendant by the Court, counsel for Defendant wrote in the word "proximate" and thereafter made reference to "proximate cause". Thereafter, there was no objection to the following statement by counsel for Defendant:

> "If one percent of the causes, of the *proximate causes,* of this accident are the negligence of Mr. Cochran you may not award damages to the Plaintiff." (T 46; emphasis added.)

There being no objection to this statement, Plaintiff is not now in a position to assert that this argument was prejudicial misconduct and reversible error.

Appellee does not agree that this argument was misconduct of any kind, nor does Appellee agree that this argument was error of any kind. The cases cited by Appellant in support of this argument all involve erroneous *instructions* by the trial court to the trial jury. No authority whatever is cited for the propo-

sition that this argument by counsel would be error, prejudicial or otherwise.

However, any possible error in the Court's instructions or in counsel's arguments must be considered harmless and must be disregarded for the reason that the Plaintiff's substantial rights were not affected.

F.R.C.P. 61 provides as follows:

> "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The doctrine of presumed prejudice has been effectively eliminated by the several statutory enactments and court rules which have evolved into F.R.C.P. 61 in its present form. See 7 *Moore's Federal Practice,* Sections 61.01 and 61.02, pages 1001-1005.

Appellee respectfully submits that any error in the Court's instructions with respect to the subject of contributory negligence must be considered harmless error under Rule 61, inasmuch as any error or defect in the instructions in this regard did not affect the substantial rights of the plaintiff. As stated in *Moore:*

> "The doctrine of harmless error expressed in Rule 61 is applicable to errors in instructions to the jury, and whether such errors are harmless or prejudicial depends upon whether substantial rights of a party are affected thereby. If objections to the instructions are properly made, errors affecting substantial rights must be considered as grounds for reversal of the judgment on appeal." (7 *Moore's Federal Practice,* Section 61.09, page 1025.)
>
> "On the other hand, errors in instructions which do not affect substantial rights of a party must be disregarded and are not grounds for disturbing the verdict or judgment." (7 *Moore's Federal Practice,* Section 61.09, page 1026.)

A review of the record in the instant case clearly establishes that any minor, technical errors in portions of the Court's instructions concerning contributory negligence could not have in any way affected the substantial rights of the Plaintiff.

Likewise, any error in the argument of counsel for Defendant was immediately corrected by the trial court and accordingly could not possibly have affected the substantial rights of the Plaintiff. Accordingly, under Rule 61, the error, if any, should be disregarded as harmless.

III. THE TRIAL COURT'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE WERE NOT PREJUDICIALLY CUMULATIVE, UNBALANCED, REPETITIOUS OR GIVEN IN ERRONEOUS ORDER.

The instructions of the Court to which objection is made are set forth in the Appendix to Appellant's Opening Brief at pages ii, iii and iv. A careful analysis of these instructions shows that they can be summarized in order as follows:

1. The Defendant claims the defense of contributory negligence and the burden is upon the Defendant to prove such negligence was a proximate cause of the accident.

2. If any negligence of the driver Francis Cochran proximately contributed to the collision, it is deemed the negligence of the Plaintiff.

3. Proximate cause is defined.

4. No. 73.21 of *Mathes and Devitt, supra,* concerning contributory negligence including the claim of contributory negligence, the definition of contributory negligence, and the burden of proof on the Defendant.

5. No. 73.23 of *Mathes and Devitt, supra,* on the issues to be determined by the jury.

6. The burden of proof is defined.

7. The burden of proof is on the Plaintiff to prove the elements of her claim.

It is obvious that these instructions do not accentuate the duty of the Plaintiff and minimize the duty of the Defendant. Quite the contrary, these instructions accentuate the burden of proof on the Defend-

ant and the duty of the Defendant to establish the defense of contributory negligence. They minimize the duty of the Plaintiff to establish the elements of her claim.

Likewise, a close scrutiny of these instructions clearly demonstrates the incorrectness of the Appellant's claim that these instructions were prejudicially cumulative, unbalanced, repetitious and given in erroneous order. It is obvious that no "impossible heights" were reached, that there was no "terrible impact and effect upon Plaintiff's case" nor any "devastating impact and effect upon the jury". In this regard, Appellant's bald assertion that these instructions had a prejudicial influence and impact upon the jury can be answered with equal vehemence that the jury obviously heeded the admonition of the Court as follows:

> "If in these instructions any rule, direction or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason you are not to single out any certain sentence, or any individual point or instruction and ignore the others; but you are to consider all the instructions as a whole, and to regard each in light of all the others.
>
> The order in which the instructions are given or the form in which they appear has no significance as to their relative importance." (T 421-422.)

Counsel for Appellant was advised by the Court in advance concerning the instructions which would be

given and the order in which they would be given. (T 385.) Likewise, counsel for Appellant was requested by the Court to state all objections and exceptions to the instructions as they were being discussed during the settlement of instructions. (T 385.) Counsel for Appellant did not object to the order of giving the instructions with the exception that counsel for Appellant objected to the order of giving the instruction on the duty of care of the rider. (T 388.) Counsel for Appellant does not advise this Court where objection was made to the order of the giving of the instructions concerning contributory negligence. Rather, counsel for Appellant attempts to excuse this oversight by claiming that the trial court did not make these instructions available to counsel for Plaintiff. This is clearly not true.

> "Mr. Richard Wait: Your Honor, at what stage under your procedure are we expected to make formal exceptions?
>
> The Court: Right now as we go along, as I pass each instruction.
>
> Mr. Richard Wait: Because, you see, I don't have the *Mathes* book and I have assumed that I should examine this and make a record of it at the end.
>
> The Court: You can come down here early in the morning and take a look at it.
>
> Mr. Richard Wait: I would be glad to do that." (T 385.)

Likewise, after the instructions had been actually given to the jury by the Court, the Court made the following inquiry:

"Are there further exceptions to the jury instructions?

Mr. Eugene Wait: No, Your Honor.

Mr. Richard Wait: No, Your Honor." (T 445.)

Obviously, counsel for Plaintiff had an opportunity to object to the Court's instructions, including the order of giving the instructions, at that moment. No objection was made and the Court had no opportunity to cure the "error" now relied upon by Appellant.

It is obvious that counsel for Plaintiff made no genuine attempt to enlighten the Court concerning the objections now presented to this Court. For example, during the settlement of instructions, counsel for Defendant offered an instruction to the effect that if there is negligence on the part of more than one driver, such negligence should not be compared. The following occurred:

"Mr. Eugene Wait: I haven't heard any instruction that covers that, that if there is negligence on the part of both they should not be compared.

The Court: I think that there is enough there about negligence and contributory negligence without this.

Mr. Richard Wait: We agree with that position.

The Court: I think this one would only be confusing.

Mr. Eugene Wait: I think it is a natural mistake of jurors to think, well, one was worse than the other one and we will say one was and the other was not.

Mr. Richard Wait: *The jury is adequately instructed by these instructions as to the meaning of contributory negligence.*

The Court: I think it would only be confusing." (T 389-390.) (Emphasis added.)

The cases relied upon by Appellant are not applicable to this case. In each instance, the language used in the questioned instructions was erroneous and required reversal. The fact that such erroneous language was repeated does not make these cases applicable to the instant case. In any event, there is no language in any of the instructions of the trial court to the jury in this case which is remotely similar to the instructions which required reversal in the cases cited.

Appellee respectfully submits that the Court's instructions taken as a whole were not erroneous in any respect and that Appellant's argument with respect to the instructions concerning contributory negligence is an attempt to make a semantic mountain out of a legalistic molehill. F.R.C.P. 61 indicates that such harmless error should be disregarded.

IV. A. THE TRIAL COURT DID NOT INSTRUCT THE JURY ON THE PRESUMPTION OF DUE CARE OF A PARTY. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE PRESUMPTION THAT THE LAW HAS BEEN OBEYED.

A careful reading of the instruction specified as error in Paragraph IV of Appellant's Brief shows that the Court did not instruct the jury that a party

is presumed to have exercised ordinary care or "due care". Accordingly, all of the cases cited by Appellant referring to instructions on the presumption of ordinary care have no application to this case.

Further, counsel for Plaintiff made no proper objection to the instruction now claimed to have been prejudicial error. The only "objection" by counsel for Plaintiff to this instruction appears in the Transcript at page 414. Counsel there states that "We think that the evidence has dispelled or eliminated any presumptions." This general objection did not advise the Court that counsel for Plaintiff was objecting to an instruction concerning a presumption of *ordinary care*. Accordingly, there was no way in which the Court could have anticipated this objection or could have corrected the error, if any. F.R.C.P. 51.

Further, counsel for Plaintiff stated that "the State of Nevada does not have the same laws as the State of California, and we think for the jury to be given that instruction is improper." (T 414.) This is not a correct statement. In fact, Nevada *does* have the same statute as the State of California. This statute is as follows:

> "N.R.S. 52.070 All other presumptions may be controverted. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by *other evidence*. The following are of that kind:
>
> 1. That a person is innocent of crime or wrong. . . .
>
> 15. That official duty has been regularly performed. . . .

20. That the ordinary course of business has been followed. . . .

28. That the thing happened according to the ordinary course of nature and the ordinary habits of life. . . .

33. That the law has been obeyed. . . ."
(Emphasis added.)

It is thus apparent from the express language of the Nevada statute that there were in existence at the time of this accident disputable presumptions in accordance with the Court's instructions. Accordingly, the instruction was not erroneous as claimed by Appellant.

The California cases relied upon by Appellant state in effect that a party may not rely upon the presumption of ordinary care where that party has testified concerning his conduct immediately prior to or at the time in question. These cases are not applicable to this case inasmuch as the Court did not instruct the jury concerning the presumption of ordinary care. In any event, these California cases are not applicable to the instant case inasmuch as the instruction actually given by the Court would benefit the Plaintiff to a greater extent than it would benefit the Defendant. In other words, the presumptions that a person is innocent of crime or wrong and that the law has been obeyed would apply to the Plaintiff who testified concerning her conduct immediately prior to or at the time in question. Likewise, these presumptions would benefit the Plaintiff by being equally applicable to the conduct of her husband, Francis

Cochran, who likewise testified concerning his conduct immediately prior to and at the time in question. Thus, the fact that these disputable presumptions could also apply to the Defendant does not sustain Appellant's argument that the instruction was prejudicial *to the Plaintiff*.

The Supreme Court of the State of Nevada has already ruled on the exact point in question. The Court held that an instruction concerning the presumption of ordinary care of the Plaintiff was not prejudicial error to the Defendant where the Plaintiff had testified fully concerning his conduct immediately prior to and at the time of the accident. In *Solen v. V. & T. R. R. Co.,* 13 Nev. 106 (1878), the Plaintiff testified fully concerning his conduct immediately prior to and at the time of the accident in which he was struck by the Defendant's train. In affirming the action of the trial court in refusing to grant a nonsuit and in affirming the verdict and judgment in favor of the Plaintiff, the Nevada Supreme Court stated as follows:

> "4. It is claimed that the court erred in instructing the jury as follows: 'In considering the question of reasonable care and prudence on the part of the plaintiff, William Solen, the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger.' Instructions of this character are usually given only in cases where the facts fail to disclose the conduct of a deceased person. But we do not think appellant has any reasonable ground to complain of the language used.

It was one of the tests by which the plaintiff's proven conduct was to be measured. It being 'the known and ordinary disposition of men to guard themselves against danger,' such conduct would be presumed in the absence of proofs to the contrary. (citing cases) But when the facts are disclosed it is then the duty of the court and jury to determine whether plaintiff's conduct in the given case did show that he had used proper care to guard himself against danger. Viewing this instruction in the strongest possible light against the appellant, it could only be considered that in support of plaintiff's conduct, as proven, it was the duty of the jury to take into consideration the fact that plaintiff, as a reasonable man, would naturally guard against danger; that his testimony was, therefore, natural and reasonable; that he must have listened and looked whenever he could (as he testified he did), and that it would be unnatural to consider his testimony false because it accorded with the known and ordinary disposition of men.

The only way the jury had of determining whether the plaintiff used due care was to bring to their aid, in connection with the proven facts their own knowledge of the common sense and experience of mankind. (citing cases)." (13 Nev. at 152-153.)

It is obvious that the law of the State of Nevada clearly supports the instruction given by the trial court and that Appellant's claim of prejudicial error is unfounded.

In similar fashion, the United States Court of Appeals for the Ninth Circuit considered the preju-

dicial effect of an instruction on the presumption of due care in *Shanahan v. Southern Pacific Co.,* 188 F.2d 564 (9th Cir., 1951). The Plaintiff had objected to the giving of the instruction and in affirming the judgment on the verdict for the Defendant, this Court stated as follows:

> "We are unable to find any prejudicial error in the challenged instruction, or that it operated to deny appellant any substantial right. Fed. Rules Civ. Proc. rule 61, . . ." (188 F.2d at 567.)

IV. B. THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT A DISPUTABLE PRESUMPTION IS TO BE CONSIDERED AS EVIDENCE. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT A DISPUTABLE PRESUMPTION CONTINUES TO EXIST ONLY SO LONG AS IT IS NOT OVERCOME OR OUTWEIGHED BY EVIDENCE IN THE CASE TO THE CONTRARY.

N.R.S. 52.070 provides that disputable presumptions "are satisfactory, if uncontradicted" and that disputable presumptions "may be controverted by *other evidence*". (Emphasis added.) It is obvious that the Court's instruction conforms to the express language of the applicable Nevada statute and that this statute considers a disputable presumption to be a form of evidence. No other conclusion can be reached in view of the fact that the statute specifically provides that disputable presumptions may be controverted by *other evidence.*

The Nevada Supreme Court in *Solen v. V. & T. R. R. Co., supra,* expressly held that the presumption of ordinary care is a form of evidence which

would rebut the other direct evidence of Plaintiff's contributory negligence and prevent a non-suit. Accordingly, the claim of Appellant that this instruction was erroneous is patently incorrect.

As stated in 29 *Am. Jur.* 2d, Evidence, Section 165 at pages 201-203:

> "A rebuttable presumption of law is a rule of the substantive law declaring that for procedural purposes a certain prima facie probative force will and shall, until evidence sufficient to prove to the contrary is introduced, be provisionally attached to a given state of facts. The existence of such a presumption is generally held to impose on the party against whom it is invoked the duty to offer evidence as to the facts, and in the absence of such evidence, the trier of the facts is compelled to reach a conclusion in accordance with such presumption. Most courts take the view that such a presumption is not evidence, has no weight as such, and disappears completely from the case upon presentation of contravening evidence sufficient to amount to the degree of evidence required by the law to meet such presumption. The presumption serves a function in allocating or raising the burden of going forward with the evidence, but when that burden is met the existence or nonexistence of the assumed fact must be determined upon the evidence for and against its existence, with no assistance whatsoever from the presumption, because that element of the assumed fact has dropped from the case.
>
> Some other courts take the view, which appears to be gaining adherents, that a rebuttable

> presumption of law is itself evidence or has evidentiary value. In some states this view is predicated upon statutory provisions to that effect. Under this view, the presumption does not disappear the moment evidence contradicting it is received, but the presumption remains in the case to be considered by the jury as evidence; it disappears only when the facts upon which it is based have been clearly overcome by evidence to the contrary. Where evidence is of such conclusive character that only one reasonable deduction can be drawn therefrom, the presumption disappears."

It is obvious that the court's instruction objected to in Paragraph IV of Appellant's Brief correctly states the law applicable in the State of Nevada and that such instruction was not error, prejudicial or otherwise. F.R.C.P. 61; *Shanahan v. Southern Pacific Co., supra.*

V. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT A VIOLATION OF A RENO CITY ORDINANCE CREATED A PRESUMPTION OF NEGLIGENCE AS A MATTER OF LAW WHICH MIGHT BE OVERCOME BY EVIDENCE OF THE EXERCISE OF ORDINARY CARE.

F.R.C.P. 51 provides that no party may assign as error the giving of an instruction unless he objects thereto, stating *distinctly* the *matter* to which he objects and the *grounds* of his objection. Counsel for Plaintiff did not object to the Court's proposed instruction concerning the violation of the Reno City Ordinance upon the ground that the instruction

should be that a violation constitutes negligence as a matter of law. The sole ground for objection by the Plaintiff appears to be that there was not sufficient evidence to support a finding against the presumption of negligence in case there was a violation of the ordinance by the Defendant. (T 394.) Counsel for Plaintiff did not attempt to advise the Court that the proposed instruction was an incorrect statement of the law in the State of Nevada. Thus, the trial court was given no opportunity to consider whether or not the instruction correctly stated the law in the State of Nevada. Accordingly, Plaintiff may not now assign as error the giving of this instruction. F.R.C.P. 51.

Appellee respectfully suggests that the instruction given by the Court was a correct statement of the law. The instruction says no more than that a violation of law constitutes negligence as a matter of law in the absence of a *preponderance* of evidence that the driver exercised ordinary care under the circumstances. Thus, under the instruction, a finding of a violation of law compels a finding of negligence in the absence of a preponderance of evidence that the driver exercised ordinary care. This is the same thing as saying that an *unexcused* violation of law is negligence as a matter of law.

The law in this regard is stated in *Prosser on Torts,* Sec. 35 (3d Ed. 1964) at pages 202-203 as follows:

> "Once the statute is determined to be applicable—which is to say, once it is interpreted as

designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an *unexcused* violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and 'jurors have no dispensing power by which to relax it,' except in so far as the court may recognize the possibility of a valid *excuse* for disobedience of the law. This usually is expressed by saying that the *unexcused* violation is negligence 'per se,' or in itself. The effect of such a rule is to stamp the defendant's conduct as negligence, with all of the effects of common law negligence, but with no greater effect. There will still remain open such questions as the causal relation between the violation and the harm to the plaintiff, and, in the ordinary case, the defense of contributory negligence, and assumption of the risk."

* * *

"Two or three jurisdictions have arrived at what appears to be *precisely the same result* by holding that the violation creates a *presumption* of negligence, which may be rebutted by a showing of an adequate excuse but calls for a binding instruction in the absence of such evidence. A considerable minority have held that a violation is only evidence of negligence, which the jury may accept or reject as it sees fit. Some of the courts which follow the majority rule as to statutes have held that the breach of ordinances,

> or traffic laws, or the regulations of administrative bodies, even though the latter are authorized by statute, is only evidence for the jury. Such cases seem to indicate a considerable distrust of the arbitrary character of the provision, and a desire to leave some leeway for cases where its violation may not be necessarily unreasonable." (Emphasis added.)

The Nevada cases cited by Appellant merely hold that under the circumstances of those cases, it was not prejudicial error to instruct that a violation of the particular law in question was negligence *per se*. These cases did not hold that the instruction given by the Court in this case would be prejudicial error.

A review of the exceptions and objections of counsel for Plaintiff to this instruction, set out on Page 21 of Appellant's Opening Brief, clearly discloses that there was no suggestion by counsel for Plaintiff that this instruction was erroneous in that it authorized evidence of ordinary care to overcome a presumption of negligence as a matter of law from a violation of ordinance or statute. (T 394.) The only objection to this instruction was limited to the position that there was no evidence which could properly rebut a presumption of negligence arising from a violation of law by the Defendant. (T 394.) Thus, counsel for Plaintiff gave the trial court no opportunity to consider the particular language contained in the proposed instruction. For this reason, Appellant may not now assert as error the giving of this instruction. F.R.C.P. 51.

It is obvious that this instruction was of greater benefit to the Plaintiff than any possible benefit which could have accrued to the Defendant. A review of the facts in this case viewed most favorably to the Defendant, as set out in the Statement of Facts hereinabove, shows that the defense relied upon evidence of two violations of law by the driver of the Cochran vehicle. The first violation was the failure of the driver of the Cochran vehicle to yield the right of way to the Defendant. The second violation was speed in excess of the speed limit of 25 miles per hour and a violation of N.R.S. 484.060 known as the "basic speed law." This instruction authorized the jury to find against the presumption of negligence as a matter of law arising from these two violations of law by the driver of the Cochran automobile. Thus, on either or both of these two claimed violations of law, the Plaintiff was the potential beneficiary of a finding against the presumption by a further finding by the jury of a preponderance of evidence of exercise of ordinary care by the driver of the Cochran vehicle. The jury apparently did not reach a finding of ordinary care on the part of the driver of the Cochran vehicle. Inasmuch as the instruction was of greater potential benefit to the Plaintiff than to the Defendant, it cannot conceivably be considered prejudicial *to the Plaintiff*. F.R.C.P. 61.

As stated in *Prosser* hereinabove, the rules of law of the majority of jurisdictions and the minority of jurisdictions are essentially the same in essence in that each allows the finder of fact to avoid a con-

clusive finding of negligence in the event of a violation of law. The majority speaks in terms of an *unexcused* violation of law as being negligence as a matter of law and the minority speaks of a violation as creating a presumption of negligence as a matter of law. Inasmuch as there is no essential difference between the two positions, Appellee respectfully submits that Appellant has failed to show any error, prejudicial or otherwise, in the giving of this instruction. F.R.C.P. 61

Appellant further objects to the instruction concerning the "basic speed law" of Nevada Revised Statutes Section 484.060. This basic speed law provides as follows:

> ". . . It shall be unlawful for any person to drive or operate a vehicle of any kind or character . . . at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or . . . at such a rate of speed as to endanger the life, limb or property of any person."

Appellant asserts that the Reno Municipal Ordinance, Section 10-111, establishing the *maximum* speed limit of 25 miles per hour "preempted" the basic speed law enacted by the Nevada State Legislature. Naturally, there is no case authority cited by Appellant for this position. It is obvious that a speed *less* than the established maximum speed limit can be unlawful under particular conditions of traffic, surface and width of the highway which might endanger the life, limb or property of any

person. Accordingly, *both* the ordinance and the State statute were applicable under the facts of this case and both were properly before the jury.

Appellant argues that the giving of this instruction concerning the basic speed law of the State of Nevada "enabled" Defendant's counsel to make an improper argument to the jury. Appellee answers this contention by pointing out that there was no such objection by Plaintiff to the instruction of the Court, no motion was made to forbid such an argument by counsel for the Defendant, and, in fact, no such argument was made by counsel for the Defendant. The reasoning of appellant in this regard is, to say the least, tortured.

Appellee respectfully submits that the instruction concerning the basic speed law of the State of Nevada was proper and was properly given by the Court to the trial jury.

VI. THE DEFENDANT PLEADED AND PROVED THE AFFIRMATIVE DEFENSE OF PASSENGER CONTRIBUTORY NEGLIGENCE.

Defendant raised the affirmative defense of the contributory negligence of the Plaintiff Lois Cochran in Paragraph II of the Defendant's Answer to the Complaint of the Plaintiff. This paragraph is as follows:

"II

Prior to and at the time of the collision referred to in the Complaint, *Plaintiff Lois Coch-*

ran and her husband Francis Cochran *negligently* drove, operated, entrusted, inspected, maintained and *used* said 1964 Plymouth automobile, *which said negligence* of *Plaintiff Lois Cochran* and Francis Cochran, her husband, *proximately contributed to the collision* between the 1964 Plymouth automobile and the 1953 Ford automobile operated by Defendant, and any and all injuries and/or damages, if any there were, resulting therefrom." (Tr. of Rec. 8; emphasis added.)

The evidence before the jury clearly established that there were no obstructions on the southwest corner of the intersection and that the view of each driver and the passenger, Plaintiff Lois Cochran, was equally clear. (T 24-25, 56, 91-92.) The Plaintiff was a passenger in the right front seat of a 1964 Plymouth Fury automobile operated by her husband Francis Cochran. (T 118-119.) The evidence established that the Cochran vehicle was exceeding the speed limit of 25 miles per hour. The Defendant Delizio testified that the Cochran vehicle was going "pretty fast, 60 is the number or better. It was pretty fast." This was corroborated by Helen Furry (T 211) and Ada Schaefer (T 309). In spite of this obvious misconduct and obvious violation of law by the driver Francis Cochran, the Plaintiff Lois Cochran made no objection or protest or warning of the obvious danger of such conduct. Further, although Plaintiff was looking down the street in an easterly direction and toward the direction in which the Defendant's vehicle was proceeding into the intersection, the Plaintiff did not see the Defendant

Delizio's vehicle until the Cochran vehicle was two-thirds of the distance through the intersection. (T 144.) This constituted substantial evidence that the Plaintiff herself had failed to exercise ordinary care as a passenger and warranted the submission of this issue to the jury.

Appellant remarks on the fact that counsel for Defendant did not even mention the subject of contributory negligence on the part of the Plaintiff herself in Defendant's closing argument. This "fact" is capable of supporting the following inferences:

1. The subject was too obvious to the jury to mention;
2. The absence of negligence on the part of the Defendant was a more important subject;
3. The negligence of the Plaintiff's husband Francis Cochran was so obvious that it was not necessary to mention the subject of Plaintiff's own contributory negligence;
4. Counsel for Defendant forgot to mention the subject.

Appellant argues that there was no *credible* evidence to support the giving of the instruction on contributory negligence on the part of the Plaintiff-passenger. This argument concerning the credibility of the witnesses was more properly presented to the trial jury. The jury determined the question of the credibility of the witnesses against the Plaintiff. Appellee respectfully submits that to argue the credibility of the witnesses to this Court is completely improper. There was substantial evidence by the

witnesses which, if *believed* by the jury, properly supports a finding of contributory negligence on the part of the Plaintiff Lois Cochran. Accordingly, the instruction was properly submitted to the trier of fact along with all questions concerning the credibility of the witnesses.

VII. THE ADMISSION OF EVIDENCE OF A PRIOR CLAIM BY THE WITNESS ADA SCHAEFER AGAINST PLAINTIFF AND HER HUSBAND DID NOT CONSTITUTE PREJUDICIAL ERROR.

The evidence to which objection is here made was given by the witness Ada Schaefer, a passenger in the right front seat of Defendant Mario Delizio's automobile, as follows:

> "Q. Okay. As a result of these injuries, did you make a claim against Mr. and Mrs. Cochran?
> A. Well, yes, there was a claim.
> Q. Is that claim presently pending?
> A. No, it's closed." (T 311.)

There was no evidence that the claim of Ada Schaefer was settled, that the claim of Ada Schaefer against Mr. and Mrs. Cochran was settled by the Cochran's insurance carrier, or that Plaintiff or her husband admitted negligence or legal responsibility for the accident. The fact that the claim was "closed" could mean that the claim had been abandoned by the claimant Ada Schaefer, that the claim had been denied and no further action on it taken, or that the claim had been submitted for decision before

some other court and decided adversely to the claimant Ada Schaefer. In any event, the evidence did affirmatively establish that there was no claim *presently* pending on behalf of the witness against the party against whom the witness was then testifying. If such a claim was presently pending, the jury could properly assume that the witness was biased or prejudiced against the Plaintiff and her husband. The fact that such a claim was not then pending was obviously relevant to rebut the suggestion of bias or prejudice on the part of the witness against the Plaintiff and her husband. Thus, the evidence was relevant and material to the issue of the credibility of the witness. Certainly no prejudice to the Plaintiff could have resulted from this innocuous bit of evidence relating to the credibility of the witness.

In *Schenker v. Bourne,* 102 N.Y.S.2d 928 (N.Y. 1951), the Court admitted evidence that the claims had been *settled.* There was no such evidence admitted in the instant case. Accordingly, this case is no authority whatever for a holding that the evidence admitted in this case was prejudicial or constituted reversible error.

Likewise, in *Ross v. Fishtine,* 227 Mass. 87, 177 N.E. 881 (1931), the offer of proof was that Plaintiff or someone in his behalf had *paid* certain sums of money to Defendant and the passengers in Defendant's car. If Defendant herein had offered testimony of the *payment* of money to Ada Schaefer by Plaintiff or someone on her behalf, the evidence would have been properly rejected. However, no such

evidence was offered by the Defendant and no such evidence was admitted by the Court. Accordingly, the *Ross* case is no authority whatever for Appellant's contention that the admission of this innocuous bit of evidence was prejudicial or constituted reversible error.

In *Meck v. Miller,* 1 F.R.D. 162 (D.Ct. Penn. 1940), the Court held that the affirmative defense of the Defendant was properly stricken. The settlement of the claims of the Defendant and his wife, an occupant of the automobile, against the Plaintiff by Plaintiff's indemnity insurance company was not relevant to the issues of negligence and contributory negligence. However, the Court in that decision did not consider the admissibility of such evidence on the issue of the credibility of a witness.

Likewise, the Court in *Meek v. Miller,* 38 F. Supp. 10 (D.Ct. Penn. 1941) was not concerned with the admissibility of such evidence on the issue of the credibility of a witness. The sole contention was that the evidence was admissible on the issues of negligence and contributory negligence. The Court properly decided that the evidence was not admissible on these issues. However, the holding of the Court is no authority whatever for the proposition that the admission into evidence of the testimony of the witness Ada Schaefer in this case was prejudicial or reversible error.

The California Appellate Court in *Zelayeta v. Pacific Greyhound Lines,* 104 C.A.2d 716, 232 P.2d 572 (1951) held that evidence of a settlement by a wit-

ness of a claim against a party was properly shown for the purpose of showing bias of the witness. The Court held that the jury ought to be instructed concerning the limited purpose of such evidence. Thus, the California Court held that such evidence is proper on the issue of the credibility of a witness but that the jury can properly be instructed concerning the limited purpose of the admission of such evidence. Here, Plaintiff did not request any instruction by the Court to the jury concerning the limited purpose for which the evidence was admitted, namely the credibility of the witness. Thus, Plaintiff is in no position to complain that the jury was not advised concerning the limited purpose for which such evidence was admitted.

Appellant's authorities concerning the admission of evidence of the settlement by way of compromise of a claim of a third person not a party to the suit are not applicable to the facts in this case inasmuch as there was no evidence here of any settlement or compromise.

Appellee respectfully submits that the evidence was properly admitted on the issue of the credibility of the witness Ada Schaefer, that Plaintiff could have and failed to request an instruction by the Court as to the limited purpose of such evidence, that such evidence was innocuous, made no reference to any settlement or compromise of the claim, and that if its admission could conceivably be considered as error, it was certainly not of sufficient substance to be considered prejudice or to constitute reversible error.

VIII. THE VERDICT AND JUDGMENT FOR THE DEFENDANT WERE PROPER AND SHOULD BE SUSTAINED.

Appellee respectfully submits that Appellant has raised but one claim of error which could have affected the substantial rights of the Plaintiff. This is the claim of Plaintiff that the trial court erred in instructing the jury that any negligence of Plaintiff's husband as driver of the car must be imputed to Plaintiff as an owner of the car under the provisions of N.R.S. 41.440. It is obvious that this instruction, if erroneous, would affect the substantial rights of the Plaintiff. However, Appellee submits that the clear language of N.R.S. 41.440 made it mandatory upon the trial court in the face of the uncontradicted evidence concerning the ownership of the vehicle to instruct that the negligence of the Plaintiff's husband was deemed the negligence of the Plaintiff if such negligence proximately contributed to the collision. As set out in Paragraph I of this brief, the Court's instruction in this regard was proper and in conformity with the law of the State of Nevada in force on the date of the accident. Accordingly, the Court's instruction was not error and cannot be the basis for a reversal of the verdict and judgment for the Defendant.

Appellee respectfully submits that all of the other claimed errors raised in Appellant's Opening Brief are within the provisions of F.R.C.P. 61 which directs that:

> "The court at every stage of the proceeding must disregard any error or defect in the pro-

ceeding which does not affect the substantial rights of the parties."

As stated in 7 *Moore's Federal Practice,* Section 61.11 at page 1030:

"Technically, Rule 61 is only a mandate to the district court, since the Supreme Court was only given authority to promulgate rules for the base line courts. But there is no doubt that the Court's views on harmless error, as expressed in the Rule, are gladly followed by the courts of appeals as expressive of the best practice."

The same authority makes the following statement:

"Judge Frank's comment that '. . . the doctrine of "harmless error" . . . to the chagrin of those devoted to a conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which can do no real harm' indicates that the courts of appeals recognize the sound judicial practice and common sense which Rule 61 enunciates." (7 *Moore's Federal Practice,* Section 61.11 at page 1031.)

28 U.S.C. § 2111 provides that:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The provisions of this section appear to be directed to the Courts of Appeals in the hearing of appeals from the District Courts. Appellee submits that the

specifications of errors II through VII of Appellant's Opening Brief do not affect the substantial rights of the Plaintiff and should be disregarded by this Court in the determination of this appeal from the judgment of the District Court entered on the verdict of the jury.

> "There can be no doubt that the integrity of verdicts, orders and judgments is the rule and the disturbance thereof is the exception. To entitle himself to relief from the verdict, order or judgment, a party must show that his case is within the exception. Error is not to be presumed but must be affirmatively shown." (7 *Moore's Federal Practice,* Section 61.11 at page 1032.)

Finally, it must be emphasized that in the present case, the record abundantly supports the Defendant's contentions that the driver of Plaintiff's automobile was negligent; that the clear language of the Nevada statute compelled the imputation of that negligence to the Plaintiff; that the Plaintiff herself was negligent; that the Defendant had the right of way and had properly proceeded into the intersection, at which point Plaintiff's husband drove a full one-half block into the intersection without seeing the Defendant; and that the instructions of the Court properly advised the jury concerning the issues to be resolved and the burden of proof with respect to the issues.

CONCLUSION

Appellee respectfully submits that the verdict and judgment for the Defendant were proper, that the instructions of the Court were not erroneous, and that the judgment of the District Court should be affirmed.

Dated, Reno, Nevada,
September 16, 1968.

Respectfully submitted,
WAIT & SHAMBERGER,
Attorneys for Appellee.

No. 22,304

IN THE

United States Court of Appeals

For the Ninth Circuit

ASSOCIATED MACHINE (Formerly Associated Machine Shop), a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW.

This is a petition for review of the decision of the Tax Court of the United States (Harron, J.) filed June 15, 1967. The opinion of the Tax Court of the United States will be found at pages 76 through 98 of the Record, and is reported as *Associated Machine v. Commissioner*, 48 T.C. No. 32. (48 T.C. 318).

JURISDICTIONAL STATEMENT.

This appeal involves an alleged deficiency in the petitioner's Federal income tax for the calendar year ended December 31, 1959, in the amount of $43,088.91. Petitioner is a corporation, organized under the laws of the State of California, and the returns for all periods in question were filed with the District Director of Internal Revenue for the District of San Francisco, California. The petition for review was filed herein on September 15, 1967, and appears at pages 100 through 105 of the Record. This appeal is taken pursuant to Section 7482 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The deficiency in question results from the disallowance of a deduction in the amount of $82,863.30 for the calendar year 1959, based upon a net operating loss sustained by the petitioner for the taxable year ended November 30, 1962, and carried back to the calendar year 1959.

The petitioner herein is the survivor of two California corporations which merged in 1960. The ultimate issue is whether the surviving corporation in a statutory merger may carry back a net operating loss as a deduction against income earned by a predecessor corporation where the merger results in *no change* in proprietory interest and *no change* or interruption in the business enterprise of the corporations involved.

The principal point upon which petitioner relies is that the merger of Associated Machine Shop and J & M Engineering was a reorganization described in Section 368(a)(1)(F) of the Internal Revenue Code, entitling the surviving corporation to carry back a net operating loss and apply it against the pre-merger income of the disappearing corporation under the authority of Section 381(b)(3) of the Internal Revenue Code.

STATEMENT OF FACTS.

On September 1, 1958, Joseph Schiavo caused the formation of a California corporation named Associated Machine Shop. He transferred to this corporation assets of a machine shop enterprise formerly operated by him as a sole proprietorship in exchange for all of the issued and outstanding stock of the corporation. On December 14, 1959, Joseph Schiavo formed a second corporation, J & M Engineering, for the purpose of engaging in fabrication and sheetmetal work. All of the issued and outstanding stock of this corporation was also issued to Joseph Schiavo. (Record, Volume I, pp. 12, 13, 79, 83, Volume II, pp. 37, 40, 42, 43).

Although Associated Machine Shop and J & M Engineering were formed to carry on separate lines of business, in fact both corporations carried on essentially the same line of business from December 14, 1959, to the date of merger. This resulted from the fact that the sheetmetal phase of the business did not develop sufficiently to be characterized as a separate business. (Record, Volume II, pp. 43, 44). The two corporations carried on their business in contiguous buildings (50 feet from each other) (Record, Volume II, pp. 45, 46) both of which were owned by Joseph Schiavo and leased to the respective corporations. Both corporations leased a substantial part of their equipment from Joseph Schiavo. (Record, Volume II, pp. 44-48).

Because J & M Engineering could not support itself in a separate sheetmetal operation, machine shop equipment was moved from the Associated Machine Shop building to the J & M Engineering building. Three-fourths of the equipment in the J & M building was machine shop equipment as opposed to sheetmetal and fabrication equipment. Also, a considerable number of Associated employees, primarily machinists, were switched over to J & M. Associated Machine furnished J & M with a buyer, estimator, salesmen, and all office, overhead, and accounting services. J & M did not pay and was never charged for *any* of these expenses, which were born *exclusively* by Associated. The corporations shared a tool crib and delivery trucks, and were covered under only one union contract. J & M did not maintain its own telephone or telephone listing. (Record, Volume II, pp. 49-56).

J & M was not able to obtain its own customers. (Record, Volume II, pp. 44-45). Its principal customer was Associated; its other customers were primarily Associated customers. Frequently both corporations worked on the same job orders. (Record, Volume II, pp. 54-56).

The articles of incorporation and by-laws of the two corporations were identical. The officers and directors of the two corporations were identical. (Record, Volume I, pp 3, 21-22, 30-31).

Because it was almost impossible to keep separate cost records for job orders involving both corporations, because the sheet metal work for which J & M En-

gineering was formed did not materialize, and because both corporations were engaged in the same line of business, Joseph Schiavo decided to merge them. (Record, Volume II, pp. 56-58). An agreement of merger was entered into on November 5, 1960, pursuant to which Associated Machine Shop was merged into J & M Engineering, and the name of J & M Engineering was changed to Associated Machine. The merger was completed December 1, 1960, and involved exchange of Associated Machine Shop stock for J & M Engineering (now Associated Machine) stock. The California Commissioner of Corporations determined that this exchange of securities did not require a permit to issue stock under California law. (Record, Volume I, pp. 14, 15, 16, 17, 49, 37-54).

After the merger, Associated Machine continued to operate both the machine shop and sheet metal business at the same physical location without any change in operations, employees, management, system of accounting, officers, directors, or stock ownership. At all times, Associated Machine Shop, J & M Engineering, and Associated Machine were completely owned, operated, and managed by Joseph Schiavo. (Record, Volume II, pp. 58, 59).

For its fiscal year ended November 30, 1962, Associated Machine sustained a net operating loss for Federal income tax purposes of $82,863.30. This net operating loss was carried back and allowed as a tentative carryback adjustment against Associated Machine Shop's income for the calendar year 1959, producing a refund of $43,088.91, plus interest. (Record, Volume I, pp. 19-20).

SUMMARY OF ARGUMENT.

The provisions of Section 381(b) of the Internal Revenue Code specifically allow the carryback of a post-merger net operating loss to offset pre-merger income only in situations where the merger is a reorganization described in Section 368(a)(1)(F), that is, a "mere change in identity, form, or place of organization, however effected." Petitioner contends that a statutory merger may, under appropriate circumstances, qualify as a so-called type "F" reorganization. In fact, the Internal Revenue Service has specifically ruled that a statutory merger as defined in Section 368(a)(1)(A) can also qualify as a type "F" reorganization. The Tax Court itself has reached the same conclusion, and has even gone so far as to disregard the forms of the reorganization entirely in allowing a loss carryback.

Petitioner contends that the question of application of the type "F" reorganization should be determined upon the basis of the following tests:

1. CONTINUITY OF OWNERSHIP - Does the reorganization result in any substantial change in the ownership of the entities involved?

2. CONTINUITY OF BUSINESS ENTERPRISE - Does the reorganization involve any substantial change in the nature of the business?

In other words, the type "F" reorganization should be recognized as a logical extension of the well established "substance vs. form" doctrine. As will be pointed

out, this approach has in the past been advocated both by the Internal Revenue Service and the Tax Court, particularly in liquidation-reincorporation cases. It also has been and is being applied in the various other Courts, notably the Fifth Circuit.

The petitioner also contends that the Tax Court has erred in this and another recent case involving the same issue, *Estate of Stauffer*, 48 T.C. 277 (1967) (also on appeal to this Court) in attempting to limit the application of the "F" reorganization to changes in a single corporate entity. The apparent rationale for this is that Congress could not have intended otherwise, a totally unsupported conclusion; and that a contrary interpretation would produce administrative difficulties, which might justify the position of the Internal Revenue Service, but which can hardly serve as the basis for a *judicial* interpretation of a statute. Also, the finding of the Tax Court that the two corporations involved in this case operated separate businesses is *totally* unsupported by the record.

This case involves the merger of two corporations with identical ownership, operation, and business enterprise. The merger resulted in *no change* in this ownership, operation, and business enterprise. This clearly qualifies as a type "F" reorganization. To disallow this loss carryback is to penalize the taxpayer for the form of the reorganization, a pragmatic, administrative approach which is not a worthy basis for a judicial determination on the merits, and which should be repudiated by this Court.

SPECIFICATION OF ERRORS.

1. The Tax Court erred in refusing to allow the petitioner to carry back the net operating loss in the amount of $82,863.30 sustained in its taxable year ended November 30, 1962, to apply against the income of its predecessor, Associated Machine Shop, for the taxable year ended December 31, 1959.

2. The Tax Court erred in failing and refusing to hold and decide that the statutory merger of Associated Machine Shop and J & M Engineering in the year 1960 was a reorganization described in Section 368(a)-(1)(F); and that therefore a loss carryback would be allowed pursuant to Section 381(b)(1) of the Internal Revenue Code.

3. The Tax Court erred in holding that Section 368(a)(1)(F) could not apply to reorganization involving more than one corporate entity.

4. The Tax Court erred in holding that the merger of a parent and subsidiary corporation might qualify under Section 368(a)(1)(F) while the merger of a brother-sister corporation could not.

5. The Tax Court erred in repudiating its own prior decisions extending Section 368(a)(1)(F) to situations such as the one in this case.

6. The following findings of fact by the Tax Court are clearly erroneous:

a. That during the period December 14, 1959, to November 30, 1960, J & M was engaged in the active conduct of its own separate business. (Record, Volume I, p. 84).

b. That during the period December 14, 1959, to November 30, 1960, both Machine Shop and J & M maintained separate records, purchased materials, supplies, and services in their own names, and paid for them with their own funds. (Record, Volume I, p. 83).

c. That Machine Shop and J & M had separate directors' and shareholders' meetings, employees, and customers. (Record, Volume I, p. 84).

7. The Opinion and Decision of the Tax Court is contrary to law.

8. The Opinion and Decision of the Tax Court is not supported by the facts as set forth in the record.

ARGUMENT.

I.

UNDER THE PROVISIONS OF SECTION 381 (b) OF THE INTERNAL REVENUE CODE OF 1954, THE POST-MERGER NET OPERATING LOSS SUSTAINED BY ASSOCIATED MACHINE CAN BE CARRIED BACK TO OFFSET PRE-MERGER INCOME OF ASSOCIATED MACHINE SHOP IF THE MERGER OF ASSOCIATED MACHINE SHOP AND J & M ENGINEERING (NOW ASSOCIATED MACHINE) WAS A REORGANIZATION OF THE TYPE DESCRIBED IN SECTION 368 (a) (1) (F) OF THE INTERNAL REVENUE CODE OF 1954.

Section 381(b) of the Internal Revenue Code of 1954 defines the circumstances under which a net operating loss sustained by a corporation acquiring property in a reorganization could be allowed as a carryback against income of the distributing corporation:

> "(b) Operating Rules - Except in the case of an acquisition in connection with a reorganization described in subparagraph (F) of Section 368-(a)(1)-
>
> . . . . . .
>
> "(3) The corporation acquiring property in a distribution or transfer described in subsection (a) shall not be entitled to carry back a net operating loss for a taxable year ending after the date of distribution or transfer to a taxable year of the distributor or transferor corporation."

It is clear from the above that a loss carryback can be applied only in cases of corporate reorganizations defined in Section 368(a)(1)(F) as a "mere change in identity, form, or place of organization, however effected." The Commissioner concedes that loss carrybacks may be so allowed in Type F reorganizations in the Regulations at Section 1.381(b)-1(a)(2):

> "(2) Reorganizations under Section 368(a)-(1)(F). In the case of a reorganization under Section 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of Section 368(a)(1)), the acquiring corporation shall be treated (for the purposes of section 381) just as the transferor corporation would have been treated if there had been no reorganization. Thus, the taxable year of the transferor corporation shall not end on the date of the transfer merely because of the transfer; a net operating loss of the acquiring corporation for any taxable year ending after the date of transfer shall be carried back in accordance with Section 172(b) in computing the taxable income of the transferor corporation for a taxable year ending before the date of transfer; and the tax attributes of the transferor corporation enumerated in Section 381(c) shall be taken into account as if there had been no reorganization."

It, therefore, must follow that if the statutory merger of Associated Machine Shop and J & M Engineering qualified as a Type (F) reorganization, the loss carryback claimed in this case is proper and should have been allowed.

Revenue Ruling 57-276 (CB 1957-1, 126) involved a statutory merger in which the disappearing corporation in one state merged into a new corporate entity

in another state. In holding that the reorganization qualified under both Sections 368(a)(1)(F) and 368(a)(1)(A), the ruling said:

> "It is believed it was not the intention of Congress in enacting Section 368(a)(1) of the Code to hold that just because a reorganization meets some other provision of Section 368(a)(1) the provisions of subparagraph (F) of that section are not complied with even though the transaction also qualifies under subparagraph (F). Taking a contrary view under the 1954 Code would, for all practical purposes, *defeat the provisions of Section* 381(*b*) of the Code, since many Section 368(a)-(1)(F) reorganizations meet some other provisions of Section 368(a)(1)." (Emphasis added).

Therefore, although the reorganization of Associated Machine Shop and J & M Engineering qualifies under Section 368(a)(1)(A), it could also qualify under Section 368(a)(1)(F). However, Revenue Ruling 57-276 left two questions unanswered:

(1) Will the same rule apply to mergers involving more than one-pre-existing corporation?

(2) What are the requirements for a reorganization to qualify under Section 368(a)(1)(F)?

The Service addressed itself to these problems in Revenue Ruling 58-422 (CB 1958-2, 145). The facts involved a parent and two subsidiary corporations, all viable, functioning entities, which merged into a new corporation in another state. On the date of the merger, the new corporate entity acquired all of the assets and assumed all the liabilities of the three predecessor

corporations. It issued common stock on a share for share basis for the common stock of the parent; the stock of the subsidiary was concelled. This was held to be a Type (F) reorganization, and the requirements for qualification of statutory mergers as Type (F) reorganizations in general were enunciated as follows:

> "Revenue Ruling 57-276, *supra*, is applicable in all cases where there is no change in the existing stockholders or change in the assets of the corporations involved."

In a very recent Revenue Ruling, 66-284 (1966-39, 8), the Commissioner reemphasized the position taken in both Revenue Rulings 57-276 and 58-422, applying the Type (F) reorganization rule to a statutory merger where a small percentage of shareholders dissented from the plan of merger and were paid for their stock.

In Petitioner's case, there was a statutory merger of two corporations wholly owned by the same person. There was no distribution of assets, no change in the nature of the assets or business, and no change in the nature of the enterprise. By the Commissioner's own definition, as set forth in the above rulings, the requirements for a Type (F) reorganization have been met.

II.

DECISIONS AND RULINGS APPLYING AND INTERPRETING SECTION 368 (a) (1) (F) OF THE 1954 INTERNAL REVENUE CODE AND ITS PREDECESSORS WOULD CLEARLY EXTEND THE TYPE "F" REORGANIZATION TO THE FACTS IN THIS CASE.

The question of what constitutes a "mere change in identity, form or place or organization, however effected" has not been the subject of frequent interpretation or litigation, at least until recently. However, the earlier decisions are enlightening. As early as 1923, the Supreme Court, in *Weiss v. Stearn*, 265 U.S. 242 (1924), held that a technical change for the purpose or reorganization in the technical ownership of an enterprise was not in itself a taxable event. A similar position was taken in I.T. 2392, VI-2 CB 17 (1927).

In *Ahles Realty Corporation v. Commissioner*, (C. C.A. 2d 1934) 71 F. 2d 1950, a corporation conveyed all of its property to a new entity. The new corporation issued stocks and bonds to the old corporation, which thereupon dissolved. The sole shareholder in the old corporation was the sole shareholder in the new corporation. This was held to be a "mere change in identity, form, or place of organization, however effected," as defined by Section 203(h)(1)(D) of the Revenue Act of 1926. In reaching this conclusion, the Court pointed out that there was "continuity of interest" as to both assets and ownership.

One of the important limits on the definition of what is now a Type (F) reorganization is found in *Helvering v. Southwest Corp.*, 315 U.S. 194 (1942), rehearing denied 315 U.S. 829 (1942), second petition for rehearing denied 316 U.S. 710 (1942). The facts were complicated, but basically involved the formation of a new corporation to take over the operations of a corporation in financial difficulty, with the creditors ending up owning most of the stock in the new corporation. The Supreme Court (at pages 202 and 203) said:

> ". . . a transaction which shifts the ownership of the proprietory interest in a corporation is hardly 'a mere change in identy, form, or place of organization'. . ."

A similar limitation on this type of reorganization was stated by the Tax Court in *Stollberg Hardware Co.*, 46 B.T.A. 788 (1942), (A.C.B. 1942-1, 16).

The above decisions indicate that historically, what is now Section 368(a)(1)(F) has been applied where the corporate reorganization has resulted in no change in the ownership of the enterprise, i.e., there was a requirement of "continuity of interest" as to the assets and the stockholders. They do *not* indicate any limitation on the use of the section based upon the *form* of reorganization or the number of entities involved. Petitioner submits that the facts of this case, involving no change in assets or ownership, clearly fit within the limitations the decisions have placed on Section 368(a)(1)(F).

III.

THE HOLDING OF THE FIFTH CIRCUIT IN DAVANT V. COMMISSIONER, WHICH WAS REPUDIATED BY THE TAX COURT, AND THE MORE RECENT DECISION OF A FEDERAL DISTRICT COURT IN HOLLIMAN V. UNITED STATES, REPRESENT CORRECT INTERPRETATIONS AND APPLICATIONS OF THE TYPE "F" REORGANIZATION IN LOSS CARRY-BACK CASES.

In its opinion, (Record, pp. 96, 97) the Tax Court concedes that the decision in *Davant v. Commissioner*, 366 F. 2d 874 (C.A. 5, 1966), modifying 43 T.C. 540 (1965), *cert. denied* 386 Y.S. 1022 (1967), is in direct conflict with the position taken by the Tax Court, and refuses to follow it. Thus there is *direct case authority* for the position taken by Petitioner here.

The *Davant* case involved brother-sister corporations ("Water" and "Warehouse") with identical shareholders, and each in a separate, active business. Through a relatively complicated transaction, one of the two corporations acquired all of the assets of the other. There was no change in ownership or business enterprise, but there was a distribution of $900,000 to shareholders.

The Tax Court was faced with the issue of whether or not the transaction was either a type "D" or type "F" reorganization (or possibly both). It concluded that a type "D" reorganization was involved; and therefore did not consider the type "F" argument. Al-

though the Government abandoned the type "F" argument on appeal, the Fifth Circuit, virtually on its own, decided the appeal primarily upon the application of Section 368(a)(1)(F) to the transaction. The Court (pp. 883-884) said:

> "A section 368(a)(1)(F) reorganization is defined as 'a mere change in identity, form, or place of organization, however, effected.' Since the Tax Court held that this transaction was a (D) reorganization, it apparently believed that is was unnecessary to decide the (F) question. In the past, type (F) reorganizations have overlapped with type (A), (C) and (D) reorganizations. For this reason this provision has received almost no administrative or judicial attention. It is true that a substantial shift in the proprietory interest in a corporation accompanying a reorganization can hardly be characterized as a mere change in identity or form. *Helvering v. Southwest Consolidated Corp.*, 315 U.S. 194 (1942).
>
> "The term 'mere change in identity (or) form' obviously refers to a situation which represent a mere change in *form* as opposed to a change in substance. Whatever the outer limits of section 368(a)(1)(F), it can clearly be applied where the corporate enterprise continues uninterrupted, except for a distribution of some liquid assets or cash. Under such circumstances, there is a change of corporate vehicles but not a change in substance. If Water had no assets of its own prior to the transfer of Warehouse's operating assets to it, could we say that Water was any more than the *alter ego* of Warehouse? The answer is no. The fact that Water already had other assets that were vertically intergrated with Warehouse's assets does not change the fact that Water was Warehouse's *alter ego*. Viewed in this way, it can make no practical difference whether the operating assets were held by Water or Warehouse, and

> a shift between them is a mere change in identity or form. At least where there is a complete identity of shareholders and their proprietory interests, as here, we hold that the type of transaction involved is a type (F) reorganization."

As will be noted, the facts in this case clearly establish that the same concept of *alter ego* or identity of interest should be applied in this case. Nor does the Tax Court deny it. Acceptance of the Fifth Circuit view requires reversal of the Tax Court in this case.

In a very recent case, a Federal District Court in Alabama followed the *Davant* opinion in *Holliman v. U.S.*, (U.S. Dist. Court, So. Dist. Ala., So. Div. 67-2 U.S.T.C. paragraph 9737). Although that case is factually distinguishable from Petitioner's, the following comments on the law by that Court are illuminating:

> "The Court finds that the arrangement was clearly an "F" reorganization within the meaning of Section 368(a)(1)(F). There was a change of vehicle but not of substance." (P. 85, 473).

The Alabama Court also cited with approval, *Davant*, *Ahles Realty Corporation v. Commissioner*, *supra*, and *Hyman T. Berghash*, 43 T.C. 743 (1965). Based upon these decisions, the Court concluded that an "F" reorganization was involved upon the following facts:

> "Here we have the same stockholders owning the old and the new company. We have the same assets. We have the same liabilities except for the scaled down demands of common creditors. And even as to these the new corporation agreed that if it failed to pay the installment parts of their respective debts the common creditors were free to advance claims for the full amounts owing

should there be a subsequent bankruptcy. The changes made were insignificant." (P. 85, 474).

On the bases of the foregoing, refunds based upon less carrybacks were allowed to the Trustee in bankruptcy of the successor corporation.

IV.

DECISIONS AND RULINGS APPLYING SECTION 368 (a) (1) (F) TO LIQUIDATION-REINCORPORATION CASES, PARTICULARLY THOSE HANDED DOWN BY THE TAX COURT, CLEARLY EXTEND THE TYPE "F" REORGANIZATION TO THE FACTS IN THIS CASE.

The application of Section 368(a)(1)(F) to the complex area of liquidation-reincorporations apparently started with Revenue Ruling 61-156, (CB 1961-2, 62), where it was applied to a sale by a corporation of all of its assets to a newly organized corporation followed by liquidation of the old corporation under Section 331 or 337 of the Internal Revenue Code. The facts in that ruling indicated that the shareholders in the old corporation owned only 45% of the stock in the new corporation.

The Tax Court has considered the application of the type "F" reorganization in a variety of liquidation-reincorporation cases. Examples are: *Joseph C. Gallagher*, 39 T.C. 144 (1962) (A. and N.A. CB 1964-2,

5); *Book Production Industries, Inc.*, (T.C. Memo 1965-65) 24 T.C.M. 339; *Reef Corporation*, (T.C. Memo 1965-72) 24 T.C.M. 379; *Estate of James F. Suter*, 29 T.C. 244 (1957). This Court has also considered it in at least one case, *Moffat et. al. v. Commissioner*, (C.A. 9th, 1966) 363 F. 2d 262.

In its opinion in our case (Record, Volume I, pp. 94-95), the Tax Court emphasized a position that the type "F" reorganization applies only to the "simplest and least significant of corporate changes." Yet in all of the cases above, the Government was strongly urging application of the section to a variety of situations, and the Tax Court has seriously considering so applying it. The tests applied by the Tax Court in those cases were not the *number* of corporate entities involved, or the *form* of the the transaction. The Court epplied basically two tests: (1) was there a substantial shift in proprietory interests, and (2) was there a substantial change in the nature of the business enterprise. Petitioner urges this Court to apply these tests used by the Tax Court to this case.

The culmination of application of Section 368(a)-(1)(F) to liquidation-reincorporation cases in the Tax Court was its decision in *Pridemark, Inc.*, 42 T.C. 510 (1964). As the case was analyzed by the Tax Court in this case (Record, Volume I, pp. 20-21), *Pridemark* involved three corporations basically owned by the same individual. Two of the corporations were dissolved, and its assets distributed to the shareholder. About a year later, he caused the formation of a new corporation, and used the assets of the dissolved cor-

porations to purchase all of the stock in the new corporation. The successor corporation engaged in the same business enterprise as its predecessors. The Tax Court held that this series of transaction constituted a type "F" reorganization, even though it involved *two separate* and *distinct* corporate entities reorganizing into *one*. The decision was reversed by the Court of Appeals for the 4th Circuit, *Pridemark v. Commissioner*, (C.A. 4th, 1965) 345 F. 2d 35, which based this decision largely on the lapse of time between dissolution of the old corporations and formation of the new one, and, as the Tax Court opinion points out, *did not* decide whether or not a type "F" reorganization could have been involved.

The Tax Court has of course conceded that its decision in this case and the *Stauffer* case are inconsistant with the *Pridemark* case. In *Stauffer*, the Tax Court went so far as to make the following statement (P. 218):

> "The case arose in the difficult area of liquidation-reincorporation, and this Court held that there had been an "F" reorganization. The briefs on this issue were skimpy, and it is obvious that the Court did not have the benefit of a presentation of materials like the one before us. . . . We think our decision in *Pridemark* was wrong . . ."

Petitioner suggests that if the Tax Court will reverse its own position on such an important area of statutory interpretation so easily, that position has little authority insofar as the decision of this Court is concerned. That lack of consistancy in application of Section 368-(a)(1)(F) will be discussed in detail in another sec-

tion of this brief. At this point, it should be sufficient to point out that *Pridemark* involved a situation where application of the type "F" reorganization was favorable to the Government position, i.e., the liquidation-reincorporation. Is it significant that where the shoe is on the other foot, and application of the Section is to the detrement of the Government's position, a different interpretation follows?

V.

THE BASIC ERROR COMMITTED BY THE TAX COURT IN ADOPTING AN INCORRECT DEFINITION AND INTERPRETATION OF SECTION 368 (a) (1) (F) IS BEST ILLUSTRATED BY ITS INABILITY TO APPLY THAT DEFINITION AND INTERPRETATION IN A SUBSEQUENT DECISION, WHEREIN THE TAX COURT INSTEAD INVENTED A COMPLETELY NEW FORM OF REORGANIZATION TO REPLACE IT.

In *Casco Products Corp.*, 49 T.C. No. 5 (1967), the owner of 91% of the stock in a corporation called Old Casco, who had been unsuccessful in redeeming the remaining 9%, formed a second corporation, called New Casco, took all of its stock, then merged the two corporations, thus effectively squeezing out the minority shareholders. New Casco was allowed to carry back its net operating loss across the line of the merger to apply against the income of Old Casco, *without the*

benefit of any of the provisions of Section 368 (*a*)-(1)(*A*) *through* (*F*). The Court expressly *refused* to indicate whether the merger qualified as a type "F" reorganization, with the following statement (P. 26):

> "Thus, both parties invite us to engage in an interpretative exercise as to the scope of section 368(a)(1)(F) and the relationship between sections 381(b) and 172. We decline the invitation to navigate these treacherous shoals. See *Reef Corporation v. Commissioner* . . . affirming in part and reversing as to the "F" reorganization issue a Memorandum Opinion of this Court: *Estate of Bernard H. Stauffer* . . . , *Associated Machine*, . . . *Dunlap & Associates* . . ."

The Court went on to hold that the merger was only a "legal technique" to freeze out minority shareholders, and did *not* have to be treated as a reorganization for tax purposes. This amazing extension of "form vs. substance," which all Courts, including the Tax Court, have considered to be the basis of the type "F" reorganization, has created a new form of reorganization, which petitioner characterizes as the type "X" reorganization.

Would the creation of a type "X" reorganization been necessary if the Tax Court had not previously failed to properly apply and interpret the type "F" reorganization? Petitioner thinks not. Petitioner submits that the Tax Court has hamstrung itself by its unfortunate decisions in the *Stauffer* case and petitioner's case. This point is further emphasized by the fact *four judges* dissented in the *Casco* decision on the basis that Section 368(a)(1)(F) should have been considered under the facts.

Petitioner submits that the reason the Tax Court refused to navigate the treacherous shoals referred to in *Casco* is that the Court itself created these dangers by its decisions in *Stauffer* and *Associated Machine*. A reversal by this Court will aid in removing these impediments to logical and reasonable interpretation and application of the statutes. It may even allow the Tax Court to eliminate its type "X" reorganization.

VI.

THE ATTEMPT OF THE TAX COURT TO LIMIT APPLICATION OF SECTION 368 (a) (1) (F) TO CHANGES WITHIN A SINGLE CORPORATE ENTITY IS WHOLLY WITHOUT MERIT.

In both the Tax Court opinion in this case (Record, Volume I, pp. 91 and 92, and its opinion in *Estate of Bernard H. Stauffer, supra*, the Court relies heavily upon the argument that Congress did not "intend" Section 368(a)(1)(F) to apply to reorganization involving more than one corporate entity. The statutory basis for this is the use of the singular word "corporation" in Section 202(c)(2) of the 1921 Revenue Act, predecessor of Section 368(a)(1)(F). All reorganization provisions are in the singular, and the full text of Section 202(c)(2) of the Revenue Act of 1921, which was *not* printed in full in the opinion, begins as follows:

> "When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization . . ."

The use of the phrase "one or more" certainly modifies the later use of the word "corporation." A parallel can be found in the provisions of Section 381(b) already quoted herein, which refer to a *transferor* and *acquiring* without in any way drawing a distinction between one or another of the types of reorganizations described in Section 368(a)(1). Petitioner could of course argue that the reference to a "transferor corporation" and "acquiring corporation" as will be found in Section 381(b) or Regulations Section 1.381(b)-1(a)(2) *infra*, proves that at least two corporations are always involved in "F" reorganizations, but this would be as fallacious as the Tax Court's conclusion that the use of the singular word "corporation" in 1921 through 1924 proves that *no more than one* corporation could be involved in a type "F" reorganization in 1968.

VII.

IN ATTEMPTING TO LIMIT THE APPLICATION AND DEFINITION OF SECTION 368 (a) (1) (F), AND THEREBY RESTRICTING THE AVAILABILITY OF THE CARRYBACK PREVILEGE, THE TAX COURT IS ACTING EXACTLY CONTRARY TO CONGRESSIONAL INTENT.

Not only has the Tax Court failed to properly interpret Congressional intent, it is asserting a position which is completely contrary to Congressional intent. The intent of Congress in enacting Sections 381 and 382 of the Internal Revenue Code of 1954 was expressed in the Senate Finance Committee Report (S. Rep. No. 1622, 83 Cong. 2nd Sess. 52) as follows:

> "Present practice rests on court-made law which is uncertain and frequently contradictory. Your committee agrees that whether or not the items carry over should be based upon *economic realities* rather than upon such artificialities as the legal form of the reorganization." (Emphasis added).

The Supreme Court and the Tax Court has interpreted the purposes of the reorganization statutes prior to 1954 in exactly the same manner, i.e., The considerations underlying the reorganization provisions are *not* cast in terms of form but of substance. *Bazley v. Commissioner* (1947) 331 U.S. 737.

The concept has also been well expressed in *F. C. Donovan, Inc. v. U.S.* (C.A. 1st, 1958) 261 F. 2d 470. This was a case wherein the Circuit Court allowed the less carryback in a parent-subsidiary merger situa-

tion. The Court applied the "economic business identity" test first enunciated in *Newmarket Manufacturing Co.* (C.A. 1st, 1956) 233 F. 2d 493, Rev'g and Rem'g 130 F. Supp. 706, *Cert. Den.* 353 U.S. 983 as follows: (P. 472)

> "The government argues, therefore, that the *Newmarket* case is not controlling here, where more than one business was involved. But we thought we had made it clear enough in the *Newmarket* case what we took to be of paramount importance, that the ownership and all other practically important attributes of the business which suffered the loss in 1952 and the business which had earned income in the previous year were unchanged. This is also true in the present case. It was in that context that we referred to the congressional desire, in enacting the carry-back privilege, to bring stability to the tax burden of 'a business with alternating profit and loss.' (233 F. 2d at page 497). And we thought that Congress must have had in mind, in this connection, the burden not of an artificial legal entity called a corporation but 'that of the human beings doing business behind the corporate facade and who, alone, actually feel the pinch of taxation'."

It is also significant to note that prior to the 1954 Internal Revenue Code, less carrybacks and carryovers were allowed only in the case of statutory mergers or consolidations. I.R.S. Section 122 (1939); *New Colonial Ice Co. v. Helvering,* (1934) 292 U.S. 435; *Newmarket Mfg. Co. v. United States, supra.* In referring to enactment of Sections 381 and 382 in 1954, the Senate Finance Committee report contained the following:

> "The new rules enable the successor corporation to step into the 'tax shoes' of its predecessor cor-

> poration without necessarily conforming to artificial regal requirements which now exist under court-made law. Tax results of liquidations or reorganizations are thereby made to depend less upon the form of the transaction than upon the economic integration of *two or more* separate businesses into a unified business enterprise." (Emphasis added). S. Rep. No. 1622, 83rd Cong. 2nd Sess. 52.

The failure of the Tax Court to properly read Congressional intent is best illustrated by the above report, which makes the following very telling points:

1. The use of the singular "predecessor corporation" and "successor corporation" in referring to all forms of reorganizations, not just a type "F" reorganization.

2. The express reference to an integration of two or more separate businesses into a unified business enterprise.

3. The specific reference to "form" vs. "substance" and the specific statement that the tax effects of the reorganization should not be based upon its "form".

Furthermore, the basic carryover and carryback provision, Section 122(b) of the 1939 Internal Revenue ode, was amended by the enactment of Section 172 of the 1954 Internal Revenue Code by eliminating the reference to "the taxpayer" who has a net operating loss being able to carry it forward or to *carry it back*. In *Maxwell Hardware Company* (C.A. 9th, 1965) 343 F. 2d 713, reversing 41 T.C. 386 (1964), this Court interpreted the new language of Section 172 as eliminating the old "same taxpayer" rule.

In summary, the Tax Court has completely erred in its interpretation of Congressional intent for the following reasons:

1. The use of the singular form is common to all statutory language pertaining to reorganizations.

2. In any case, Congressional intent should be read with reference to the 1954 Internal Revenue Code, which completely revised prior rules relating to reorganizations and loss carryovers and carrybacks.

3. The clear intent of Congress in 1954 was to *liberalize* the rules pertaining to loss carryovers and carrybacks, and to cast the reorganization provisions in terms of economic realities rather than legal forms of organizations.

VIII.

THE TAX COURT'S LIMITED APPLICATION OF SECTION 368 (a) (1) (F) TO CHANGES IN A SINGLE CORPORATE ENTITY CANNOT BE RECONCILED WITH THE APPARENT EXCEPTION FOR REORGANIZATION INVOLVING PARENT-SUBSIDIARY CORPORATIONS.

As we have just seen, the Tax Court relies very heavily upon so-called "Congressional Intent" to restrict the type "F" reorganization to changes in single corporate entities. Yet, in the *Associated Machine* opin-

ion, the Court is able to conclude that mergers of parent-subsidiary corporations may qualify under Section 368(a) (1) (F). As the Tax Court stated (Record, Volume I, p. 97):

> "The theory behind this distinction is that if a parent and subsidiary can file a consolidated return and benefit from the carryback provisions of Section 381(b), there is little reason to deny the same parent and subsidiary the right to effectuate the same thing another way—by merging on into the other or both into a newly formed corporation."

But what does this have to do with Congressional intent? How can the Tax Court in all good sense first argue that the statute was intended to be limited to a single entity, then blandly apply it to multiple entities, on the illogical basis that the multiple entities could have filed consolidated returns and accomplished the same thing? (Since consolidated returns are not at issue here, petitioner will refrain from discussing the obvious fallicies in the Court's statement that a reorganization does not differ in any material respect from filing consolidated returns).

The purpose of the corporate reorganizations is not to give corporations a choice between filing consolidated erturns and reorganizing corporations. The privilege of filing consolidated returns in no way affects the definitions in Section 368(a)(1). The attempts by the Tax Court to distinguish Revenue Ruling 58-422 on the basis that it applies only to parent-subsidiary corporations must be repudiated.

IX.

THE DECISION OF THE TAX COURT IN THIS CASE IS INCONSISTENT WITH ITS DECISIONS INTERPRETING SECTION 368 (a) (1) (F), INCLUDING A DECISION HANDED DOWN AS RECENTLY AS FEBRUARY, 1967.

The confused reasoning of the Tax Court in this area is well illustrated by its own decisions involving the type "F" reorganization. An excellent example is of course *Pridemark*, which the Court could not circumvent, and had to overrule. But there are other Tax Court decisions which were not overruled. For example, in *Joseph C. Gallagher*, 39 T.C. 144 (1962); *Book Production Industries, Inc.*, 24 T.C.M. 339 (1965); *Reef Corporation*, 24 T.C.M. 379 (1965) aff'd. (5th Cir. 1966) 368 F. 2d 125, cert. den. 386 U.S. 1018; *Hyman H. Berghash*, 43 T.C. 743 (1965) aff'd. (2nd Cir. 1966) 361 F. 2d 257; *Turner Advertising of Kentucky, Inc.*, 25 T.C.M. 532 (1966) and *Dunlap & Associates, Inc.*, 47 T.C. 542 (1967), all involved the question of application of Section 368(a)(1)(F). In *none* of these cases, most of which involved liquidation-reincorporation, did the Tax Court indicate that the number of entities or the form of the reorganization were of any significance. The Court instead applied tests of economic reality. Was there a shift of proprietory interest? Was there continuity of business enterprise? These are the tests which the same Court has now abandoned in favor of tests based upon form, not substance.

X.

IN ADMITTING THAT ITS INTERPRETATION OF SECTION 368 (a) (1) (F) WAS MATERIALLY INFLUENCED BY DIFFICULTIES OF ADMINISTRATION AND APPLICATION WHICH WOULD RESULT FROM AN INTERPRETATION MORE FAVORABLE TO THE TAXPAYER, THE TAX COURT ABDICATED ITS JUDICIAL FUNCTION.

Although hesitant to present this argument, the Petitioner is forced to conclude that the Tax Court was unduly influenced by respondent's arguments that application of Section 368(a)(1)(F) to reorganizations involving multiple corporations would result in administrative difficulties for the Internal Revenue Service. Although this point was not specifically alluded to in the Court's opinion in this case, it was in the *Stauffer* decision, which was cited with approval in *Associated Machine*. The illuminating and disturbing language employed in *Stauffer* includes the following: (P. 218).

> "Moreover, if several predecessors can be involved in an "F" reorganization difficult problems would arise as to which predecessor or whether all predecessors taken together may be taken into account in determining whether the complex requirements of . . . Section 1244 have been satisfied."

> "Unless we follow the obviously intended "one corporation" reading of the "F" reorganization, we would be faced with a difficult problem for which no solution is provided in the Code or regulations."
>
> "The Code is an extraordinarily complex and sensitive instrument, and we should be careful not to give an interpretation to one provision that would generate unintended difficulties in respect of other provisions, unless such interpretation is clearly called for by the statute itself."

This last quoted paragraph is *totally extraordinary.* Wherein does it contain any reference to the rights of the taxpayers to uniform application of the revenue laws, the concept of reasonable interpretation of statutes, and the hardships such rigid interpretations might impose upon taxpayers? Does the Tax Court exist as a forum for disputes between the taxpayers and the Treasury Department, or an administrative arm of the Treasury Department? Petitioner calls upon this Court to repudiate this unfortunate language, with the hope that the Tax Court will some day also repudiate it.

XI.

THE "UNINTENDED DIFFICULTIES" USED BY THE TAX COURT AS A BASIS FOR REFUSING TO BROADLY INTERPRET SECTION 368 (a) (1) (F) ARE NON-EXISTENT; THERE IS AMPLE AUTHORITY AND PRECEDENT FOR CARRYING A NET OPERATING LOSS BACK ACROSS THE LINE OF A CORPORATE MERGER, INCLUDING THAT FOUND IN A RULING OF THE INTERNAL REVENUE SERVICE.

Although Petitioner completely rejects the Tax Court's use of administrative convenience as a basis for statutory interpretations, Petitioner also contends that the so-called "unintended difficulties" envisioned by the Court are not insurmountable. It is true that neither Section 172 nor Section 381(b) provide operating rules to cover the situation before the Court. But these sections contain no rules at all pertaining to loss carrybacks, and the failure of the Commissioner to issue interpretative rulings and regulations certainly does not prove the point.

The 1939 Internal Revenue Code also contained no operating rules for loss carrybacks across the lines of corporate mergers, nor did the regulations thereunder. However, there was ample case authority under the 1939 Code for such carrybacks. *F. C. Donovan, Inc. v. U. S., supra,* involved the merger of an active subsidiary into an active pertinent corporation. *Moldit, Inc. v. Jarecki,* (D.C.N.D. Ill. 1953) 45 Aftr. 1014, involved a survivor corporation which was allowed to carryback a loss against the income of *two* pred-

ecessor corporations. *Koppers Company v. United States* (CT. CL. 1955) 134 F. Supp. 290, allowed a carryback of an unused excess profits tax credit to a merged group of corporations which had filed consolidated returns.

Recognizing the validity of loss carrybacks to apply against premerger income of constituent corporations, and seeing the necessity to formulate some rules therefor, the Commissioner issued Revenue Ruling 59-395 (C.B. 1959-2, 475), which contains the following language (at pp. 478-479):

> "While on the basis of the particular facts before it in the *Libson* case a carry-over of a net operating loss was there denied, it is the opinion of the Internal Revenue Service that, in view of the principles enunciated and the decisions cited by the Court in that case, a different result would be warranted under the 1939 Code where a carry-over across the line of a statutory merger would result in application of either premerger losses or unused excess profits credits of an absorbed constituent corporation to offset income derived by the resultant corporation from the same business by which the loss was sustained or the credit acquired. For the same reasons, *carry-backs of net operating losses* and unused excess profits credits of the resultant corporation attributable to absorbed constituent corporations would appear to be properly allowable, to the extent that they offset premerger income of such constituent corporations, in determining the tax liability to which the resultant corporation has succeeded. . . .
>
> "Accordingly, absent any evasion or avoidance of tax within the purview of Section 129 or other provisions of the 1939 Code, with respect to statutory mergers and consolidations the tax treatment of which is determined under such code, it is held

> that . . . the portion of the net operating losses and unused excess profits credits attributable to the assets acquired by the resultant corporation from an absorbed constituent and used in continuing the prefusion business of such absorbed constituent, *may be carried back*, to the extent that they offset the prefusion income of the absorbed constituent, in determining, the tax liability to which the resultant corporation has succeeded." (Emphasis added).

Although this ruling was applicable to pre-1954 Code years, Petitioner contends that it points the way to the solutions to the "unintended difficulties" envisioned by the Tax Court in not allowing the loss carrybacks. The allocation referred to in that ruling could be amplified by the Commissioner to produce ruling or regulations which would clearly set out the methods to be used in making the offset of postmerger losses against premerger income. The difficulties are hardly insurmountable.

There is in fact ample precedent for the type of rulings or regulations contemplated by Petitioner. An excellent example will be found in Regulations Section 1.172-7 relating to joint returns of husband and wife, covering the carryback of a net operating loss from a joint return year to another joint return year or to separate returns of the spouses; as well as the carryback of a net operating loss from a separate return year to a joint or separate return year. The regulations under Section 381, notably Regulations Sections 1.381(c)(1)-1(d) through 1.381(c)(1)-1(h), pertain to problems of loss carryovers no more difficult than the problems of carrybacks which would result from this case.

XII.

A DECISION FAVORABLE TO THE PETITIONER IN THIS CASE WILL NOT HAVE THE EFFECT OF EXTENDING THE TYPE "F" REORGANIZATION TO A GREAT NUMBER OF CORPORATE REORGANIZATIONS.

The "unintended difficulties" argument of the Tax Court seems to carry an underlying premise that should Petitioner prevail, there would be no end to the application of Section 368(a)(1)(F) to a large variety and number of corporate reorganizations. This is not correct. A favorable decision in this case within the guidelines herein discussed would limit the type "F" reorganization to cases where the reorganization meets the following requirements:

1. No substantial shift in assets or ownership.

2. A "continuity of interest" as to the assets, ownership, and business enterprise after the merger.

3. Satisfaction of the "form vs. substance" test as to the *economic effect* of the reorganization.

Petitioner submits that these facts will not be found in large numbers of corporate reorganizations. Petitioner further submits that this was exactly what Congress had in mind when it singled out the Type "F" reorganization for special treatment, as with reference to loss carrybacks. The intent was not to *penalize* the taxpayer by reason of the form of reorganization selected, where in substance the same business or businesses are continuing in altered form.

XIII.

THE FINDING OF THE TAX COURT THAT THE TWO CORPORATIONS HERE INVOLVED, ASSOCIATED MACHINE SHOP AND J & M ENGINEERING, WERE COMPLETELY SEPARATE AND DISTINCT ENTITIES ENGAGED IN ACTIVE CONDUCT OF SEPARATE BUSINESSES, IS CLEARLY ERRONEOUS AND CONTRARY TO OTHER TAX COURT DECISIONS.

In its opinion, (Record, Volume I, pp. 84, 93, 95) the Tax Court finds that the two pre-existing corporations were completely separate and distinct entities, each carrying on a separate and distintc business. Quite to the contrary, the record (Volume II, pp. 44-59) indicates the following:

1. J & M Engineering, although formed to operate a separate sheet metal business, was never able to do so successfully.

2. In fact, J & M Engineering operated a machine shop business indistinguishable from that carried on by Associated Machine Shop.

3. Most of the machine shop work carried on by J & M was for the account of Associated Machine Shop, on orders produced by Associated Machine Shop, or for customers of Associated Machine Shop.

4. The equipment used by J & M Engineering included substantial amounts transferred over from Associated Machine Shop.

5. J & M Engineering did not advertise or even maintain a telephone service under its own name.

6. Associated Machine Shop provided all office, administrative, and accounting services for J & M *without cost* to J & M.

7. The Union did not even recognize J & M as a separate entity for collective bargaining and contract purposes.

8. The articles of incorporate, by-laws, directors and officers of the two corporations were substantially identical.

In view of the above facts, how can it be said that these were two separate and distinct entities carrying on separate and distinct businesses? The statement of facts relied upon by the Tax Court are not in accord with the record. For example, while the Tax Court points out that J & M Engineering was organized to carry on a sheet metal business, it *does not* point out that the sheet metal business was not great enough to support the corporation, and that the *majority* of its activity was devoted to machine shop work *identical* to that carried on by Associated Machine Shop. While the Tax Court points out (Record, Volume I, p. 93) that J & M had its own customers and contracts, it *does not* point out that by far the greatest volume of its work came through Associated Machine Shop, directly or indirectly.

In its findings (Record, Volume I, pp. 83-84), the Tax Court emphasizes several facts, including the maintenance of separate bookkeeping and accounting records; purchases and sales in separate names; separate payrolls; and the maintenance of separate corporate seals, minute books, stock registers and bank accounts. Reliance on such facts is *totally inconsistant* with prior cases in which the Tax Court said these same factors should be *disregarded* in determining whether or not the corporations were engaged in separate business activity. The best example is *Aldon Homes, Inc. v. Commissioner,* 33 T.C. 582 (1959), which also involved brother-sister corporations. All of the above factors were present in that case, yet the Tax Court held there were no separate business activities. The following language is particularly significant (pp. 600-601):

> "Holding corporate meetings, adopting by-laws, electing officers and directors, and issuing stock and other securities, though necessary steps in preparation for the carrying on of business activities, were merely formal acts of organization and were not substantive income-producing activities. Nor did the keeping of seperate books for each of the corporations, of itself, constitute such business activity. . . . Their original incorporators were identical and their articles of incorporation and minutes of meetings were substantially identical. . . ."

In summary, the Tax Court and for that matter, this Court (*British Motor Car Distributors, Ltd. v. Commissoner,* (C.A. 97A, 1960) 278 F. 2d 392; *Shaw Construction Co. v. Commissioner,* (C.A. 9th, 1960)

323 F. 2d 316) have generally recognized that the status of separate corporate entities should be equated in terms of *economic realities*, not *formal requirements*. Petitioner submits that an application of this same line of reasoning to Petitioner's case clearly discloses the fallicy of the findings of the Tax Court.

XIV.

THE APPLICATION OF THE ALTER EGO DOCTRINE, AS SUGGESTED BY THE FIFTH CIRCUIT IN DAVANT AND THE FOURTH CIRCUIT IN PRIDEMARK, WOULD REQUIRE A DECISION IN THIS CASE FAVORABLE TO THE PETITIONER.

In the *Davant* opinion, the Fifth Circuit made a specific reference to the *alter ego* doctrine as a basis for its decision. Similary, in *Pridemark v. Commissioner*, 345 F. 2d 35 (C.A. 4th, 1965) the Fourth Circuit, at page 42, stated that the application of Section 368(a)(1)(F) ". . . is limited to cases where the corporate enterprise continues uninterrupted . . ." and ". . . there is a mere change of corporate vehicles, the transferee being no more than the *alter ego* of the transferor."

Alter ego is, of course, a term of special significance in corporation law with reference to disregarding a separate corporate entity to prevent fraud or injustice. In *Fisser v. International Bank*, (CA 2d, 1960) 282 F. 2d 231, at page 234, the Court said:

> ". . . it is clear that the consequence of applying the alter ego doctrine is that the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all."

It is reasonable to infer that in using the term *alter ego* in *Pridemark*, the Court of Appeals was using it to mean that the surviving corporation in a type (F) reorganization must be in substance the same business (as opposed to legal) entity as its predecessors. In the last section of this argument, Petitioner pointed out that the facts of this case relating to the organization, operation, and merger of Associated Machine Shop, J & M Engineering, and Associated Machine *clearly* indicate that there was only one business entity involved.

The California Corporate Securities Law, Title 4, Division 1 of the California Corporations Code, provides strict regulation of the sale and issuance of securities of California corporations, requiring issuing corporations to obtain permits from the California Commissioner of Corporations. This authority and restriction extends to the issuance and exchange of shares in statutory mergers. California Administrative Code, Title 10, Section 759. Yet, although the California of Corporations has extended his authority to the point of requiring a permit to be obtained by a foreign corporation to change only the voting rights of outstanding shares in *Western Airlines, Inc. v. Sobieski* 12 Cal. Rptr. 719 (1961), he *did not* require a permit for the issuance and exchange of shares in this merger

(Exhibit 8-H). Thus, the California Commissioner of Corporations did not give recognition to the separate legal entities.

Insofar as the tax law is concerned, the legal doctrine of *alter ego* is more closely identified with the multiple corporation problem, where the concept of one taxable entity in substance as opposed to two or more entitles in form is well recognized. *Aldon Homes, Inc.*, 33 T.C. 582 (1959), applied Section 61(a) of the 1954 Internal Revenue Code to tax the income of several corporations to one entity, upholding the contention that the various corporations were not "tax worthy" entities and "lacked substance and realty." The term "one taxable entity" was applied by this Court in an earlier case where there were four separate legal entities "in form." *Advance Machinery Exchange, Inc.*, (T.C. Memo 1949) 8 T.C.M. 84, affirmed *Advance Machinery Exchange, Inc. v. Comm.* (CA 2d, 1952) 196 F. 2d 1006, cert. den. (1952) 344 U.S. 835. Congress adopted the "single entity" approach with the enactment in 1964 of the new multiple corporation provisions, Sections 1561, 1562, and 1563. The two predecessors of the Petitioner clearly would have constituted a "brother-sister controlled group" under Section 1563(a); and, therefore, would have been entitled to only one surtax exemption.

Under either an *alter ego* or single taxable entity approach, this reorganization should qualify under Section 368(a)(1)(F).

CONCLUSION

Based upon all of the foregoing, Petition submits that the decision of the Tax Court in this case was based upon a rule of convenience, not upon a sound analysis and interpretation of the law, and should be reversed by this Court.

Respectfully submitted,

JERRY A. KASNER,
Attorney for Petitioner.

Certification

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinon, the foregoing brief is in full compliance with those Rules.

Jerry A. Kasner,

No. 22,305

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

C & C PLYWOOD CORPORATION and VENEERS, INC.,

Respondents.

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), [1] for enforcement of its order issued against C & C Plywood Corporation

[1] The pertinent statutory provisions are reprinted in Appendix B, *infra*, pp. B-1, B-2.

and Veneers, Inc. (herein sometimes called the Companies), on April 13, 1967. The Board's Decision and Order (R. 54-59)[2] are reported at 163 NLRB No. 136. A prior Board decision, of which the Board took official notice, pursuant to stipulation of the parties (Tr. 27-28), has been reported at 148 NLRB 414. This Court has jurisdiction, the unfair labor practices having occurred near Kalispell, Montana. No jurisdictional issue is presented (R. 30; R. 40).

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Companies violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.[3] The underlying facts, most of which were stipulated at the hearing before the Trial Examiner and which are not in dispute, are summarized below.

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[2] References designated "R" are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript as reproduced in Volume II of the record. References designated "G.C.X." are to exhibits of the General Counsel and those designated "Jt. Ex." are to exhibits jointly introduced by the parties at the hearing. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO.

A. Background

1. The Companies' business and corporate setup

C & C Plywood Corporation has its office and principal place of business near Kalispell, Montana, and is there engaged in the manufacture of plywood panels (R. 30; R. 13, 16, see also, *C & C Plywood Corp.*, 148 NLRB 414, 421, and *N.L.R.B. v. C & C Plywood Corp.*, 351 F.2d 224, 225 (C.A. 9)). Veneers, Inc.,operates a plant which physically adjoins the plant of C & C Plywood Corporation, where it is engaged in the production of green veneer, approximately 95 percent of which is sold to C & C Plywood Corporation (R. 30; R. 13, 16).

The Companies have common officers, share common top management, are subject to common control of their labor relations policies and share the use of office and shop facilities (R. 30; R. 13, 16). During the time here material the Companies admittedly constituted a single integrated employer within the meaning of Section 2(2) of the Act (R. 30; Tr. 40, R. 13, 16).

2. The violation of Section 8(a)(5) and (1) determined in the prior proceeding

The Board certified the Union as representative of the Companies' production and maintenance employees on August 28, 1962 (R. 31, 54; R. 14, 16, Jt. Ex. 1, see Jt.

Ex. 2 and Tr. 40). [4] The Union and the Companies thereafter executed a collective bargaining agreement on May 1, 1963, effective to October 31, 1963, and from year to year thereafter unless either party notified the other of a desire to change or terminate the agreement (R. 31, 54; Jt. Ex. 3, pp. 1, 11-12).

The contract contained a wage clause (Article XVII) stating, in part (R. 31, 54; Jt. Ex. 3, p. 10):

> A. A classified wage scale has been agreed upon by the Employer [5] and the Union, and has been signed by the parties and thereby made a part of the written Agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. * * *

On May 20, 1963, C & C Plywood Corporation, relying on the above clause, and without prior notice to or bargaining with the Union, posted a notice announcing that, effective immediately and for the next couple of months, all members of the glue spreader crews would receive premium pay, provided that they met certain production standards (R. 31, 55-56; Tr. 27-28, see 148 NLRB 414, 415, 422-424). The Union contended that this pay plan was not "premium pay

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[4] In the representation proceeding the Companies originally objected to being treated as one "employer" under the Act but did not request the Board to review the Decision and Direction of Election issued by the Regional Director containing a determination to this effect (Tr. 26, Jt. Ex. 2).

[5] The preamble to the agreement (Jt. Ex. 3, p. 1) defined "Employer" as "C & C Plywood Corporation and Veneers, Inc., both of Kalispell, Montana * * *"

within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union." After meeting with C & C Plywood Corporation on two occasions in an unsuccessful effort to induce that Company to rescind the plan, the Union filed charges — served on July 31, 1963 — that C & C Plywood Corporation had refused to bargain in violation of Section 8(a)(5) and (1) of the Act by unilaterally establishing the premium pay plan (*Ibid.*).[6]

On October 24, 1964, the Board found that C & C Plywood Corporation had unlawfully refused to bargain by the unilateral introduction of the premium pay plan for the glue spreader crews. 148 NLRB 414-419. This Court denied enforcement of the Board's order in *N.L.R.B. v. C & C Plywood Corporation,* 351 F.2d 224 (No. 19,769, decided September 10, 1965), but the Supreme Court reversed that decision with directions to enforce the Board's order. *N.L.R.B. v. C & C Plywood Corporation,* 385 U. S. 421. On August 31, 1967, this Court entered its decree in No. 19,769, pursuant to the mandate of the Supreme Court.

B. The Unfair Labor Practice — the Companies Terminate the Collective Labor Agreement and Refuse to Bargain with the Union

On August 27, 1963, the Companies wrote to the Union giving 60 days' notice of their desire to terminate the labor agreement as of October 31, 1963, and on the same day they filed with the Board's Regional Director a petition for an election (R. 31, 55; Tr. 30-31, Jt. Exs. 4, 6(a), 6(b)). In their letter to the Union, the Companies

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[6] Veneers, Inc. was not a party to that proceeding (R. 55, n. 2, 148 NLRB 414, 420). See pp. 15-17, *infra.*

further stated that they had a good-faith doubt as to the majority status of the Union, and that if this issue was not settled by November 1, 1963, the Companies would withdraw recognition of the Union on that date "pending the outcome of the [Board-conducted] election" (Jt. Ex. 4). The Union, in turn, on August 29, 1963, served on the Companies a 60-day notice of its desire to make changes in the contract and offered to meet with the Companies for bargaining purposes at a mutually convenient time (R. 32; Tr. 30-31, Jt. Ex. 5). The Regional Director dismissed the Companies' representation petition on September 26, 1963, because of the pending unfair labor practice proceeding (*supra,* pp. 4-5), and the Board affirmed his decision on December 3, 1963 (R. 31, 55; Tr. 31-32, Jt. Exs. 7, 8, 9). The Companies filed another representation petition in late January 1964, after the Trial Examiner had issued his decision in the prior unfair labor practice proceeding recommending dismissal of the complaint — a decision which, as previously noted, the Board reversed in October 1964 (R. 32, 55; Tr. 32-33, Jt. Ex. 10(a) and (b)). This petition, too, was dismissed by the Regional Director and, on review, by the Board on the ground that the unfair labor practice charges were pending (R. 32, 55; Tr. 33, Jt. Exs. 11-13).

In the case at bar, charges were filed on November 5, 1964, alleging that the Companies had refused to bargain collectively with the Union (R. 29, 55; G.C.X. 1A). The Companies admitted the allegation in the Complaint that they refused to recognize the Union for any purpose after August 26, 1964,[7] but contended that they had a good-faith doubt as to the Union's majority status in August

[7] The reasons for this date are explained, *infra,* p. 14.

1963, and, additionally, that the Union no longer represented a majority of their employees in April 1964 and thereafter (R. 55, 58; R. 14, 17-19, 45, Tr. 38, see R. 52, no. 30).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found upon the foregoing facts that the Companies were not entitled to question the Union's continuing majority status on the strength of evidence of employee disaffection coming to their attention after the unremedied unfair labor practice committed by C & C Plywood Corporation during the Union's certification year (R. 58). Accordingly, it found that the Companies violated Section 8(a)(5) and (1) of the Act by their failure and refusal to bargain with the Union on and after August 26, 1964.[8]

[8] The Trial Examiner had concluded (R. 31-34) that the Companies were not precluded from raising a doubt of the Union's majority status by reason of the unfair labor practice in the prior case (R. 34-40), but also found that the Companies did not have reasonable grounds for believing that the Union had ceased to be the majority representative. The Board reversed the Examiner on the first point (R. 55-58) and found it unnecessary to pass on the second issue (R. 56, n. 9). Since the disagreement involves solely conclusions of law, the Trial Examiner's finding on the first issue is not entitled to special weight. *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474, 494, 496; *Cheney California Lumber Co. v. N.L.R.B.*, 319 F.2d 375, 377 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F.2d 447, 451 (C.A. 9); see also, *N.L.R.B. v. C & C Plywood Corp.*, 385 U. S. 421, 424, and *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (C.A. 9). "The law has not committed the decisional process to the Trial Examiner. Administration of the Act has been reposed in the Board." *Warehousemen, etc., Local 743 v. N.L.R.B.*, 302 F.2d 865, 869 (C.A. D.C.); accord: *Oil, Chemical & Atomic Workers, etc. v. N.L.R.B.*, 362 F.2d 943, 946 (C.A. D.C.).

SPECIFICATION OF POINT RELIED UPON

The Board properly found that the Companies' refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act, in view of the unremedied refusal to bargain during the Union's certification year.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANIES VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AFTER THE EXPIRATION OF THE CERTIFICATION YEAR

Introduction

This case does not involve any dispute over the underlying facts. At issue is the Board's power to extend, beyond the year following a union certification dishonored during that year, the period during which the union's loss of majority does not affect the employer's duty to respect the certification. Also at issue is the question of whether the Board properly applied its extension policy in the present case. We show below first, that the Board has such authority in the exercise of its wide discretionary powers in matters affecting representation, and second, that the application of the Board's extension rule to this case is a reasonable exercise of its statutory obligation to encourage voluntary collective bargaining as an alternative to industrial strife.

A. The Board's policy of extending a bargaining agent's certification "year" when an employer has refused to bargain during that year is reasonable and proper

Under settled law, for a period of 1 year from the date of certification, an employer may not challenge the Union's majority status even if it becomes impaired through no fault of the employer. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, affirming, *N.L.R.B. v. Ray Brooks*, 204 F.2d 899 (C.A. 9); *N.L.R.B. v. Holly-General Co.*, 305 F.2d 670 (C.A. 9). [9] As the Supreme Court stated in *Ray Brooks, supra*, at 100:

> * * * A union should be given ample time for carrying out its mandate on behalf of its members and should not be under exigent pressure to produce hothouse results or be turned out.
>
> * * * It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time,

[9] Accord: *N.L.R.B. v. U.S. Sonics Corp.*, 312 F.2d 610, 616 (C. A. 1); *N.L.R.B. v. Henry Heide, Inc.*, 219 F.2d 46, 47-48,(C.A. 2). cert. denied, 349 U.S. 952 , *N.L.R.B. v. Satilla Rural Electric Membership Corp.*, 322 F.2d 251, 253 (C.A. 5); *N.L.R.B. v. Commerce Co., d/b/a Lamar Hotel* 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Kenneth B. McLean v. N.L.R.B.*, 333 F.2d 84 (C.A. 6); *Kingsbury Electric Cooperative, Inc. v. N.L.R.B.*, 319 F.2d 387, 391 (C.A. 8); *N.L.R.B. v. Burnett Construction Co.*, 350 F.2d 57, 60 (C.A. 10).

> while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.[9a]

Under a corollary rule, the Board, with the approval of the courts, requires an employer who deprives the certified bargaining agent of some part of its bargaining year to bargain for a reasonable period beyond the certification year, regardless of the union's *de facto* majority. *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Lamar Hotel*, 137 NLRB 1271, 140 NLRB 226, enforced *sub nom. N.L.R.B. v. Commerce Company*, 328 F.2d 600, 601 (C.A. 5), cert. denied, 379 U.S. 817; *N.L.R.B. v. Burnett Construction Co.*, 350 F.2d 57, 60 (C.A. 10); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 382 F.2d 921, 923-924 (C.A. 5);

[9a] The Board also refuses to entertain a representation petition after the certification year has expired where the employer and the certified union have executed a collective bargaining agreement extending for a reasonable period beyond the year. *See Local 1545, Carpenters v. Vincent*, 286 F.2d 127, 130-131 (C.A. 2); *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583, 592 (C.A. 2); *Harbor Carriers of New York v. N.L.R.B.*, 306 F.2d 89, 91-92 (C.A. 2), cert. denied, 372 U.S. 917; *Ludlow Typograph Co.*, 108 N.L.R.B. 1463; *Purity Baking Co.*, 124 NLRB 159, 162, n. 10. The Companies argued before the Board that in order to comply with the rule just stated they were willing to recognize and deal with the Union until November 1, 1963, the date as of which they terminated the existing labor contract. (Jt. Ex. 4, see Jt. Ex. 3, pages 11-12.) We submit that it is immaterial whether the Companies, absent the unfair practice committed in May 1963, would have been obligated to recognize the Union until the end of the certification year, August 29, 1963 (*supra*, p. 3) or the termination date of the contract, October 31, 1963, since the Board found that the present unfair labor practice was committed on and after August 24, 1964 (R. 38-40, 58).

N.L.R.B. v. John S. Swift Co., 302 F.2d 342, 346 (C.A. 7); see also, *Superior Engraving Co. v. N.L.R.B.*, 183 F.2d 783, 792-793, 794 (C.A. 7), cert. denied, 340 U.S. 930, where the Court held that the reasonable time during which an employer is obligated to bargain with a certified representative is exclusive of any intervening period during which negotiations have been suspended because a dispute between them has been submitted to another Government agency for resolution. The principles which underlie the extension of the certification "year" under these circumstances are also implicit in the Supreme Court's observation that

> " * * * A bargaining relationship once rightfully established must be permitted to exist *and function* for a reasonable period in which it can be given a fair chance to succeed."

Franks Bros. Co. v. N.L.R.B., 321 U.S. 702, 705 (emphasis supplied). Therefore, the certification "year" has been extended not only where (as in the case at bar) the Board found a violation of Section 8(a)(5) during the year, but where there was a breakdown of the bargaining relationship during that period without such a finding. *Superior Engraving, supra; W. B. Johnston Grain Co., v. N.L.R.B.*, 365 F.2d 582, 586 (C.A. 10) (settlement without admission of a violation).[10]

B. The Board properly applied its *Mar-Jac Poultry* rule to this case

As shown in the Statement, C & C Plywood Corporation violated Section 8(a)(5) during the certification year by the unilateral wage increase granted the glue spreader crews. There

[10] Accord: *Poole Foundry & Machine Co. v. N.L.R.B.*, 192 F.2d 740 (C.A. 4), cert. denied, 342 U.S. 954; *N.L.R.B. v. Stant Lithograph, Inc.*, 297 F.2d 782 (C.A.D.C.), enforcing 131 NLRB 7.

can be no doubt that by unilaterally changing the wage rates of a substantial group of employees, C & C Plywood Corporation seriously obstructed the Union's performance of its representative function. As stated by the Board (R. 57-58):

> The failure to accord the Union its rightful role in the establishment of new wage rates for the glue spreader crews necessarily tended to undermine the Union's authority among the employees whose interests it was obligated to represent in such matters. The unilateral grant of wage increases, having occurred only 3 weeks after execution of a new collective-bargaining agreement, graphically portrayed to employees that their Employer was in a position to confer economic benefits that their Union was unable to extract during recent contract negotiations. Furthermore, the Union, by virtue of the unlawful conduct, was compelled to take a position which could hardly prove popular with employees in the represented unit. Thus, Respondent C & C Plywood's action forced the Union to a choice between two evils: it could resist the Company's action, thereby risking disaffection from the group of employees whose wage increases it would appear to oppose in resisting the Company's unilateral actions, or it could acquiesce in

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[11] According to a stipulation by counsel for C & C Plywood Corporation in the prior case (C.A. 9, No. 19769, Board Case No. 19-CA-2686, Tr. 44), the total number of employees on the glue spreader crews was 26 on April 1, and May 1, 1963, 30 on June 1, and 32 on July 1, August 1, and September 1, 1963. The number of employees in the bargaining unit eligible to vote in the Board election on July 26, 1962, was 134 (Jt. Ex. 4, p. 1).

> the Company's action, thereby demonstrating its unwillingness, if not its inability, to protect and maintain the carefully worked out wage differentials established in the collective-bargaining agreement. Either choice would necessarily expose the Union to a charge of unsatisfactory representation of employee interests and weaken its prestige and authority as their representative, with erosion of majority status the probable result.
>
> On the basis of the foregoing considerations, we are satisfied that Respondents were not entitled to question the Union's continuing majority status on the strength of evidence of employee disaffection coming to their attention in the aftermath of Respondent C & C Plywood's unremedied unfair labor practice. Accordingly, we find that Respondents violated Section 8(a)(5) and (1) of the Act by their failure to bargain collectively with the Union on and after August 26, 1964. [Footnotes omitted.]

The record also supports the Board's rejection of the Companies' contention that the refusal to bargain found in the previous proceeding could not have seriously affected the Union's position as the collective bargaining representative of the employees. The Board found on this issue (R. 58) that C & C Plywood's action was "highly visible involving, as it did, a change in the schedules of compensation negotiated a short 3 weeks earlier," and that there was "a distinct probability that the employee disaffection with their bargaining representative relied upon by * * * [the Companies] is ground for their refusal to bargain with the Union was caused by the prior unfair labor practice." The Board's evaluation of the importance and possible effect of the prior refusal to bargain accords with the Supreme Court's holding in *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. at 429, n. 15, "* * * the real injury in this case is to the union's status as bargaining representative." As the Court further observed, "* * * the Board has not construed a labor agreement to determine the extent of the contractual rights which

were given the union by the employer. * * * It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment - - 'to provide a means by which agreement may be reached.' " See also, *N.L.R.B. v. Katz*, 369 U.S. 736, 741-743, 747-748; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 221, 225.

Accordingly, the Board was warranted in finding that this unremedied conduct in derogation of the Union's certification–and less than 3 weeks after the Company's execution of a bargaining agreement–precluded them from questioning the certified Union's majority status.[12] The propriety of this conclusion does not depend on a finding that such unlawful conduct was in fact the cause of any loss of the Union's majority. As this Court held in *N.L.R.B. v. Andrew Jergens*, 175 F.2d 130, 134-135 (cert. denied, 338 U.S. 827):

> * * * it is reasonable to assume that in the presence of unfair practices a decline in employee support does not reflect an untrammeled expression of the employees' will, and that the unfair labor practices must be purged before the representation question can be accurately determined.

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[12] In accordance with the date alleged in the complaint, the Board found that the Companies' refusal to bargain violated the Act on and after August 26, 1964, 2 days after the Board's decision in 148 NLRB 414 which found the prior unilateral conduct to be unlawful (R. 39, 58, G.C. Ex. 1(b), Par. 8). The Companies are in no way aggrieved by this ruling; for the limitations period imposed by Section 10(b) of the Act empowered the Board to find that the Companies' refusal to deal with the Union constituted a statutory violation on and after May 5, 1964, 6 months prior to the date of the charge. See, *Aero Corp.*, 149 NLRB 1283, 1285, 1293, 1345-1346, enforced, 363 F.2d 702 (C.A.D.C.), cert. denied, 385 U. S. 973.

Accord: *Sakrete of Northern California, Inc., v. N.L.R.B.*, 322 F. 2d 902, 909 (C.A. 9), cert. denied, 380 U.S. 961. No different result is indicated by the Companies' offer of proof (Tr. 28-30) that the number of employees in the unit had substantially increased and that of 201 employees in the unit on September 3, 1963 (a week after the Company withdrew recognition), only 78 had been in the Companies' employ in July 1962, the date of the representation election. We submit that neither turnover of employees, nor increase in the number of employees in the unit since the Union acquired representative status, in any way detracts from the Union's right to represent a unit of employees who voted for it in a certification election and whose support was subjected to the erosive effect of a visible disregard of the Union's representative function. *N.L.R.B. v. Katz*,369 U.S. 736, 748, n. 16; *N.L.R.B. v. Luisi Truck Lines,* F.2d , 66 LRRM 2461, 2464, 56 LC (C.C.H.) Par. 12,246 (C.A. 9, No. 21554, Oct. 27, 1967), where this Court upheld a bargaining order and found immaterial the employer's contention that only 1 out of 10 employees in the unit at the time of the bargaining demand was still in its employ at the time of the court proceedings.

We now turn to the defenses raised by the Companies before the Board and in their answer before this Court to the effect (1) that Veneers, Inc., had not been found guilty of an unfair practice in the prior proceeding and, therefore, had not violated Section 8(a)(5) and (1) in 1964; (2) that the Board erred in not ordering an election after the expiration of the contract upon the Companies' petition; and (3) that the Companies, in August, 1963, had a good faith doubt as to the Union's majority status and were, therefore, not obligated to continue recognizing and bargaining with the Union.

1. As shown, *supra,* p. 3, the Board found in the case at bar that both Companies had violated Section 8(a)(5) and (1) of the Act and ordered them to remedy the violations found. The Companies argued before the Board (R. 47, n. 10) and again

before this Court (R. 63, III(1)) that Veneers, Inc., was not a party to the 1963 proceeding and that, therefore, the Board could not properly find that that corporation violated the Act by its 1964 refusal to honor the certification issued with respect to the employees of both companies. However, the stipulated record shows that the two corporations have common officers and share common top management; they are subject to common control of their labor relations; their plants are adjoining; they accepted the ruling of the Regional Director (Jt. Ex. 2) that they constitute one "employer" under the Act, and they entered into one working agreement with the Union (Jt. Ex. 3).[13] While that agreement contains separate classifications and wage rates for C & C Plywood Corporation and Veneers, Inc. (Jt. Ex. 3, pages following the signatures), Article XVII (set out, *supra,* p. 4), dealing with premium rates covers both plants, and the unilateral introduction of the premium pay plan for the glue operator crews of C & C Plywood Corporation was purportedly based on this article and was introduced by Thomason, the general manager of both plants. See 148 NLRB 414, 423, 425. In its letter of May 27, 1963, addressed to "C. O. Thomason, General Manager, C & C Plywoods and Veneers, Inc." , the Union protested the unilateral introduction of the plan and claimed that it was not justified by Article XVII,[14] a contention sustained by

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[13] In addition, the Regional Director found in the Decision and Direction of Election (Jt. Ex. 2, p. 2) that the Companies share a single general manager; that the plant superintendent of C & C Plywood Corporation hires employees for both plants; that the logs which enter the Veneers, Inc., production line to be made into veneer usually end up as plywood panels after the bulk of the veneer passes through the production line of C & C Plywood Corporation; that one fireman operates the boilers of both plants; and that the millwrights of both Companies intermingle, their work overlaps, they use the same shop, and they receive the same wage rate. Moreover, both Companies' employees during the 60-day "training period", and both Companies' carpenters and electricians, receive the same pay rate. The Companies have no other common job classifications. (Jt. Ex. 3, pages following the signatures).

[14] 148 NLRB at 424, and General Counsel's Exhibit 4 in Board Case 19-CA-2686, submitted to this Court in Case No. 19,769.

the Supreme Court. Under these circumstances, the Board was clearly entitled to treat the two Companies as one for the purpose of the Section 8(a)(5) and (1) findings. *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 227; *A. M. Andrews Co. of Oregon v. N.L.R.B.*, 236 F. 2d 44 (C.A. 9); *Majestic Molded Products, Inc. v. N.L.R.B.*, 330 F. 2d 603,607-608 (C.A. 2).[15] Particularly because the 1963 flouting of the Union's certification was committed by both corporations' general manager in erroneous reliance on a contract provision executed by both corporations and covering both corporations' employees, the Board properly found that in 1964 both corporations were still bound by the certification even though the 1963 proceeding resulted in an order naming C & C only. See, *N.L.R.B. v. Parran*, 237 F.2d 373, 375 (C.A. 4); *Makela Welding, Inc., v. N.L.R.B.*, 56 L.C. para. 12352 (C.A. 6), December 15, 1967); *N.L.R.B. v. Colten*, 105 F. 2d 179, 180-183 (C.A. 6); *N.L.R.B. v. Hopwood Retinning Co., Inc.*, 104 F.2d 302, 303-305 (C.A. 2).[16] In any event, Veneers, Inc., should not be permitted to benefit by C & C's unfair labor practices, since the "two affiliated companies * * * adopted a common policy and front for labor matters designed to serve joint rather than separate interests." *Majestic Molded Products, Inc., supra*, 330 F.2d at 608. Because both affiliated Companies withdrew recognition from the Union after its certification had been flouted by the prior unfair labor practice, it is only fair that the Board's order be directed against both.

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[15] Accord: *N.L.R.B. v. Lexington Electric Products Co.*, 283 F.2d 54, 57, (C.A. 3), cert denied, 365 U.S. 845; *N.L.R.B. v. Parran*, 237 F. 2d 373, 375 (C.A. 4); *N.L.R.B. v. W. L. Rives Co.*, 328 F.2d 464, 468 (C.A. 5); *N.L.R.B. v. City Yellow Cab Co.*, 344 F.2d 575, 576 (C.A. 6); see also *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 907 (C.A. 9), cert. denied, 379 U.S. 961, and *Harvey Aluminum, Inc., et al. v. N.L.R.B.*, 335 F. 2d 749, 757 (C.A. 9), remanding, on other grounds, 139 NLRB 151.

[16] No claim has been made that Veneers, Inc., was not aware of the unfair practice proceeding in the prior case. Moreover, it is settled that service on one corporate entity of a group constituting a single employer is adequate notice to all. *Potter v. Castle Construction Co.*, 355 F.2d 212, 213-215 (C. A. 5), and cases cited; *N.L.R.B. v. Deena Artware*, 310 F.2d 470, 473 (C. A. 6).

2. In accordance with its policy of long standing, the Board does not proceed with a representation case while charges are pending against an employer or the effects of prior unfair labor practices have not been dissipated. See *American France Line*, 3 NLRB 64, 75, 76; *Western Union Telegraph Co.*, 32 NLRB 210 217; *Columbia Pictures Corp.*, 81 NLRB 1313, 1314-1315; Cox, *Labor Law: Cases and Materials* (1958) 341-342. The reason for this rule is that employees cannot exercise true freedom of choice in the face of interference and coercion, and, as the Board held in *Int'l Hod Carriers, etc.*, 135 NLRB 1153, 1165, the Act does not "compel the holding of an election * * * where because of unremedied unfair labor practices * * * a free and uncoerced election cannot be held." The Board's policy in this respect has been approved by this and other courts. *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 209, n. 2 (C.A. 9); *N.L.R.B. v. Auto Ventshade, Inc.*, 276 F.2d 303, 307-308 (C.A. 5); *N.L.R.B. v. Local 182, I.B.T.*, 314 F.2d 53, 59-60 (C.A. 2); *Surprenant Mfg. Co. v. Alpert*, 318 F.2d 396 (C.A. 1); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 382 F.2d 921-924 (C.A. 5); *N.L.R.B. v. Commerce Co., supra*, 328 F.2d at 600 (C.A. 5); *Furr's, Inc. v. N.L.R.B.*, 350 F. 2d 84, 85-86 (C.A. 10); see also *Int'l Telephone & Telegraph Co. v. N.L.R.B.*, 382 F.2d 366, 369 (C.A. 3), petitions for cert. pending, Nos. 772, 773, Oct. Term 1967.[17]

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[17] In their brief to the Trial Examiner, the Companies claimed that the Board's policy of refusing to conduct an election during the pendency of unfair labor practice proceedings constituted a "rule" which was not valid because it had not been issued in accordance with the Administrative Procedure Act. This argument is insubstantial since it is settled that the Board, like other administrative agencies, may enunciate principles and policies by either the method of rule making or the process of case-by-case adjudication. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 348-349; *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803; *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202-203. See also *N.L.R.B. v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 57 (C.A. 2), cert. denied, No. 352, Oct. Term 1967, 36 U.S. Law Week 3144, and *Boire v. Miami Publishing Co.*, 343 F.2d 17, 23-24 (C.A. 5), cert. denied, 382 U.S. 824.

Nothing in the cases on which the Company relied before the Trial Examiner and the Board suggests that the Board erred herein in rejecting the Companies' request for an election and directing them to bargain. In *N.L.R.B. v. Minute Maid Corp.*, 283 F. 2d 705 (C.A. 5), the Court found (contrary to the Board) that the employer had not violated its bargaining obligation during the certification year; accordingly, the Court held, the employer could lawfully withdraw recognition because decertification petitions filed by a considerable majority of the employees in the bargaining unit after the end of the certification year warranted a good-faith doubt of majority. However, in *N.L.R.B. v. Commerce Co., supra,* 328 F. 2d at 601, the same circuit – after citing *Minute Maid* – upheld the Board's action in dismissing a decertification petition filed after the expiration of the certification "year," and requiring the employer to bargain, where the employer had refused to bargain within the certification year. As that same circuit recently observed in *Miami Coca-Cola Bottling Co., supra,* 382 F. 2d at 924, the good-faith doubt defense "necessarily must fall if there was no good faith bargaining during the certification year." The Companies' reliance on *N.L.R.B. v. Warrensburg Board & Paper Co.*, 340 F. 2d 920 (C.A. 2), is equally misplaced. The Court there held that despite the union's prior loss of majority, an employer had violated Section 8(a)(5) by refusing to sign, during the certification year, a labor contract agreed on with the union. The Court pointed out that after the end of the certification year the employees might have filed a decertification petition, that alternatively, the employer might have filed a petition at that time, and that "[n]o showing was made * * * that the Board, supposing that * * * [the employer] had filed a petition for decertification would decline to process the * * * petition." *Loc. cit.* at 924, n. 5. Nothing in the decision suggests that the Board must hold an election during the pendency of an unfair labor practice

charge, particularly where, as here, the charge was ultimately found to have been justified.

3. In their Answer before this Court, the Companies allege that "the parties stipulated the existence of the Employers' good-faith doubt" of the continued majority status of the Union (R. 64, No. 4), and that there was no "evidence of any anti-union animus" on their part (R. 64, No. 7). The first contention is not supported by the record because the stipulation between the parties refers only to allegations concerning information obtained by the Companies about the employees' alleged desire no longer to be represented by the Union after the prior refusal to bargain (Tr. 28-30). As we have shown *supra*, pp. 14-15, such defection would not have relieved the Companies of their duty to bargain, and the General Counsel properly objected to the offered evidence on this issue as irrelevant (Tr. 30). We submit, moreover, that the alleged good faith constitutes merely an erroneous view of the law concerning the Union's continued status as the employees' bargaining representative, and that the violation committed by the Companies' does not depend on antiunion animus. It is settled law that "[e]ven though the offending party's view of the law is honestly mistaken * * * good faith is not available as a defense to a charge of refusal to bargain." *N.L.R.B. v. Amalgamated Lithographers of America*, 309 F. 2d 31, 42 (C.A. 9), cert. denied, 372 U.S. 943.[18] It is also immaterial

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[18] Accord: *Int'l Ladies' Garment Workers' Union, etc. v. N.L.R.B.*, 366 U.S. 731, 739; *Old King Cole v. N.L.R.B.*, 260 F. 2d 530, 532 (C.A. 6); *Timken Roller Bearing Co. v. N.L.R.B.*, 325 F. 2d 746, 754 (C.A. 6), cert. denied, 376 U.S. 971; *Florence Printing Co. v. N.L.R.B.*, 333 F. 2d 289, 291 (C.A. 4); *N.L.R.B. v. My Store, Inc.*, 345 F. 2d 494, 498, n. 2 (C.A. 7), cert. denied, 382 U.S. 927; *N.L.R.B. v. Burnett Construction Co.*, 350 F. 2d 57, 60 (C.A. 10).

that during part of the period of time during which the Companies refused to bargain, they had been held by this Court not to have violated the Act during the certification year. See *Int'l Union of Electrical Workers, etc. v. N.L.R.B.; Erie Technological Products, Inc. v. N.L.R.B.*, 328 F. 2d 723 (C.A. 3), enforcing *Erie Resistor Corp.*, 132 NLRB 621, where, as here, the Court of Appeals had originally dismissed the complaint and the Supreme Court had found a violation (373 U.S. 221). The Third Circuit held, after remand, that "[a]n employer who pursues a course of conduct later determined to be an unfair labor practice does so at his peril." (328 F. 2d at 724).[19] See also *Katz, supra*, 369 U.S. at 743: "Clearly the duty [to bargain] thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact* – 'to meet * * * and confer' – about any of the mandatory subjects." [Emphasis in original.] Accord: *Miami Coca-Cola Bottling Co., supra*, 382 F. 2d at 924.

[19] It is to be noted that that case involved substantial backpay awards (see 132 NLRB at 632-636), whereas in the case at bar the Companies were only ordered to bargain in good faith with the Union.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.[20]

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National Labor Relations Board.

January 1968.

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[20] There is no substance to the Companies' argument in their answer filed with this Court (R. 63-64) that, because counsel for the General Counsel filed no exceptions to the Trial Examiner's finding that the Companies' refusal to bargain was unlawful, the Board could not (as it did) reach the same result for different reasons. Section 10 (c) and (e) of the Act (*infra*, pp. A4-A5) leaves the Board "free to use its own reasoning," and does not restrict it to the reasoning used by the Trial Examiner. *N.L.R.B. v. WTVJ, Inc.*, 268 F. 2d 346, 348 (C.A. 5). In fact, as held by this Court, even if no exceptions are filed to the decision of a trial examiner recommending dismissal of the entire complaint, the Board may reverse and issue an order against respondent. *N.L.R.B. v. M. L. Townsend,* 185 F. 2d 378, 384, cert. denied, 341 U.S. 909. These decisions accord with the legislative history of Section 10(c) of the Act, as amended by the Labor-Management Relations Act of 1947, which strongly suggests that the relevant portion of Section 10(c) was enacted to reduce the Board's workload, and not for the purpose of limiting its powers. See the statements by Senator Taft, 2 Leg. Hist., 1947 Act (U.S. Government Printing Office, 1948) 1542 and 1625.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel,

National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer–

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purpose of this section, to bargain collectively is the performance of the obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification–

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:

* * *

In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation,

any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order or for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations,

if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Table of Exhibits Presented Pursuant to Rule 18(f) of the Rules of this Court

(Numbers are to pages of reporter's typewritten transcript)

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) through (f)	4	4	4
1(g) through (k)	24	24	25

JOINT EXHIBITS

1	26	26	39
2	26	26	39
3	27	27	39
4	30	30	39
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6	31	31	39
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No.	Identified	Offered	Received in Evidence
15	34	34	39
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No. 22305

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION AND VENEERS, INC., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENTS
C & C Plywood Corporation and Veneers, Inc.

GEORGE J. TICHY,
Attorney for Respondents

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENTS
C & C Plywood Corporation and Veneers, Inc.

JURISDICTION

This matter is before this Court on the petition of the National Labor Relations Board for the enforcement of its Order against the Respondent Employers, C & C Plywood Corporation and Veneers, Inc.

issued on April 13, 1967. (R. 60-61)[1] The Board's Decision and Order is reported at 163 NLRB No. 136. In their Answer, the Respondent Employers have denied the commission of any unfair labor practices, and have requested that this Court deny enforcement of the Board's Order and dismiss these proceedings. (R. 62-65) The Respondents believe that this Court has jurisdiction of this matter under Section 10(e) of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.)

STATEMENT OF THE CASE

I. Introduction to the Bargaining Relationship.

A representation election was conducted by the National Labor Relations Board on July 6, 1962, in which Plywood, Lumber & Sawmill Workers Local Union No. 2405, herein called the Union, was the petitioning union, and C & C Plywood Corporation and Veneers, Inc. were the Employers. On August 28, 1962, the Board, through its Regional Director, certified the Union as bargaining agent. (Tr. 25, Jt. Ex. 1)

Bargaining followed in a series of meetings between the parties and was consummated in a collective bargaining agreement on April 19,

[1] For the convenience of the Court, the same abbreviations have been employed in this Brief as in the Board's Brief. Thus, "R." refers to Vol. I of the Transcript of Record followed by the handwritten page number appearing at the bottom center of the page involved. "Tr." refers to Vol. II of the Transcript of Record (Reporter's Transcript) followed by the handwritten page number appearing in the upper right hand corner of the cited page. Jointly introduced exhibits are designated "Jt. Ex." followed by the Exhibit number. "G.C.Ex." denotes a General Counsel's Exhibit followed by the number of the Exhibit.

1963. The agreement was then reduced to writing and was executed by the parties on May 1, 1963. (Tr. 26-27, Jt. Ex. 3)

II. The Facts upon which the Premium Pay Unfair Labor Practice was Based.

On May 20, 1963, C & C Plywood Corporation, one of the Respondent Employers here, announced a premium pay plan for those of its employees employed as members of its glue spreader crews. The Union objected to the plan and in two successive grievance meetings sought to have the Company rescind it. The Company refused, contending that the plan was initiated properly under the provisions of Article XVII, Section A of the labor agreement between the parties. (Tr. 27) The pertinent portion of that Section of the Agreement upon which C & C relied provides:

> "A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written Agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like.* * *" (Jt. Ex. 3, p. 10)

The Union was unsuccessful in its efforts to get the Company to rescind the premium pay plan. The Union was totally uninterested in discussing the basis for or conceivable revisions in the plan. Instead, on July 31, 1963 the Union filed unfair labor practice charges against C & C Plywood Corporation.[2]

III. The Premium Pay Unfair Labor Practice Proceedings.

After hearings were held, a Trial Examiner of the Board

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[2] Case No. 19-CA-2686. Veneers, Inc. was not named in that case and was not a party to it. This is not the alleged unfair labor practice upon which this case before this Court is based. It is an antecedent unfair labor practice charged only against C & C Plywood and is material to a consideration of this case.

rendered his Decision in which he found that no unfair labor practices had been committed and recommended that the Complaint be dismissed in its entirety. The Union, and General Counsel of the Board, filed exceptions to the Decision and appealed the matter to the Board. The Board, in a split decision, reversed the Trial Examiner and found that C & C Plywood Corporation could not rely on the language of the labor contract and thus had violated the Act by effectuating the premium pay plan without first bargaining the specific plan with the Union. (148 NLRB 414, 1964) C & C Plywood Corporation deemed the decision to be in error and promptly advised the Board that it would not comply and urged that the matter be presented to this Court. This was done. This Court, in a considered decision, refused to enforce the Order of the Board (351 F.2d 224, September 10, 1965) The Board then sought certiorari to the United States Supreme Court. This was granted. (384 U.S. 903) Thereafter, upon due proceedings being held, that Court, relying upon the absence of an arbitration clause, a condition voluntarily preferred by the parties, set aside the language of the contract as playing no part in the Company's original decision to establish the premium pay plan and reversed this Court, ordering the enforcement of the Board's Order herein. (385 U.S. 421, January 9, 1967)

IV. Employees Advise of Union's Loss of Majority Status.

Meanwhile, after July 15, 1963, many employees within the bargaining unit came to the management of Respondent Employers' and advised the Employers that they, the employees, no longer wished to be represented by this Union and that it was their opinion that a majority of the employees in the bargaining unit no longer

wished to be represented by this Union. (Tr. 28-29) As a consequence of these developments, which were substantiated by other factors, the Respondent Employers believed in good faith that the majority status of the Union no longer continued in the appropriate bargaining unit.[3]

V. The Employers Seek Resolution of Union Status.

The Employers, however, were not at liberty to immediately refuse to bargain further with the Union because of the restrictions placed upon taking any action under these circumstances by the National Labor Relations Board.[4] Thus, the Employers were re-

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[3] Substantiating factors include the large number of employees within the bargaining unit openly opposed to the Union continuing as bargaining agent; a significant increase in crew size from 145 (134 of whom were eligible to vote) at the time of the representation election (July 26, 1962) to 201 as of September 3, 1963, immediately following the Employers' first request for a representation election; the turnover that had occurred within the crew by which only 78 of the original 145, or less than 54% of the original crew, remained in the employ of the Employers, and only 68, or less than 47%, of the original crew that voted in the July, 1962 representation election were employed on September 3, 1963. (Tr. 29-30) The Union also verified its lack of support by employees within the bargaining unit in the exchange of correspondence between the Employers and the Union in March, 1964 (Jt. Ex. 18 and 19)

[4] The Board has held that neither party to an existing labor agreement may seek a representation election during the sixty day period immediately prior to the expiration of that contract, which is known as the insulated period. Instead, the Board has ruled that such an election must be sought either in the thirty day period prior to the aforesaid insulated period or after the expiration of the contract. Deluxe Metal Furniture Co., 121 NLRB 995 (1958) as modified by Leonard Wholesale Meats, 136 NLRB 1000 (1962). In addition, the Board will consider a continuing contract to be a bar to a representation proceedings so it is necessary that one or both of the parties to the labor contract serve notice upon the other opening the contract for changes or terminating it. General Cable Corporation, 139 NLRB 1123 (1962) Finally, the third applicable Board rule is stated in Purity Baking Company, 124 NLRB 159, 162 n. 10 (1959) as follows: "In Centr-O-Cast & Engineering Company, 100 NLRB 1507, the Board established the rule that all petitions filed within the certification year of an incumbent union would be dismissed as premature. However, in Ludlow Typograph Company, 108 NLRB 1463, we held that where an employer and a certified union execute

quired to await the end of the certification year as well as the period more than sixty days but less than ninety days prior to the contract terminal date and either open or terminate the labor agreement in a timely manner as a condition precedent to questioning the continued bargaining authority of the Union in order to get any hearing at all before the Board.[5]

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one contract within the certification year, the certification year merges with the contract, after which there is no need to protect the certification further, and the contract becomes controlling with respect to the timeliness of the filing of a rival petition." Such has also been held to be the rule with respect to a petition filed by either party to the contract as well. Bert Wilkins Logging Co., Inc., NLRB Case No. 19-RM-294, July 6, 1960; Purity Baking Co., supra; Stroehmann Brothers Co., 120 NLRB 752 (1958)

[5] These rules are cited for the purpose of placing the facts of this case in the then existing posture of the applicable law. Such citation is not to imply that the rules are either correct or proper under the Act. The Board has the tendency to inaugurate new rules in its decisions without notice to the parties so that one never knows precisely what will be the disposition of his matter if the Board should choose it to enunciate a new rule applicable to the factual situation of that matter. This propensity of the Board to leave the labor law of our land in a never ending chaotic state is well illustrated by but a few examples. Compare U. S. Gypsum Co., 157 NLRB 652 (1966) with Whitney's, 81 NLRB 75 (1949) and Westinghouse Electric Corp., X-Ray Div., 129 NLRB 846 (1960); or compare Bernel Foam Products Co., Inc., 146 NLRB 1277 (1964) with Aiello Dairy Farms, 110 NLRB 1365 (1954) and M. H. Davidson Co., 94 NLRB 142 (1951); or compare Town & Country Mfg. Co., Inc., 136 NLRB 1022 (1962) and Fibreboard Paper Products Corp., 138 NLRB 550 (1962) with Mahoning Mining Co., 61 NLRB 792 (1945) and Walter Holm & Co., 87 NLRB 1169 (1949); or compare Great Western Sugar Co., 137 NLRB 551 (1962) with Whitmoyer Laboratories, 114 NLRB 749 (1955); or compare Quaker City Life Insurance Co., 134 NLRB 960 (1961) with Metropolitan Life Insurance Co., 56 NLRB 1635 (1944); or compare Local 41, Int'l Hod Carriers (Calumet Contractors Assn.), 133 NLRB 512 (1961) with Red Robin Stores, Inc., 108 NLRB 1318 (1954). See also Excelsior Underwear, Inc., 156 NLRB 1236 (1966). And precisely in point to the case at hand, compare C & C Plywood Corporation, 148 NLRB 414 (1964) with United Telephone Co. of the West, 112 NLRB 779 (1955) and Morton Salt Co., 119 NLRB 1402 (1958).

The labor contract provided that it was to continue to November 1, 1963 but could be opened for changes or terminated upon sixty days prior written notice to the other party. (Jt. Ex. 3, pp. 11-12, Art. XXI) Thus, under date of August 27, 1963, the Respondent Employers served notice upon the Union terminating that Agreement as of November 1, 1963.[6] (Tr. 30, Jt. Ex. 4) On August 28, 1963, precisely one year after the date of the certification of the Board and within the period permitted by Leonard Wholesale Meats (supra, n. 4, p. 5), the Respondent Employers filed a Petition with the Board seeking a representation election. (Tr. 31, Jt. Ex. 6(a) is covering letter; Jt. Ex. 6(b) is the Petition. This became Case No. 19-RM-484)

On August 29, 1963 the Union served notice upon the Employers by which it opened the labor contract to negotiate changes in it. (Tr. 30, Jt. Ex. 5)

Without a hearing, under date of September 26, 1963, the Regional Director of the Board dismissed the Employers' representation petition noting:

> "The investigation discloses that there is an unresolved unfair labor practice charge pending against the company which alleges, in addition to other matters, a refusal to bargain. No action can be taken on the instant representation case until that charge has been resolved." (Jt. Ex. 7)

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6 In that letter Respondents stated in part:
"This, of course, means that our present agreement will be in effect until November 1, 1963, and as in the past we stand ready to deal with you on any matters arising from the bargaining relationship or contract until that date.
"If this matter is not settled by November 1, 1963, please consider this as notice that we are withdrawing recognition of your Union on that date pending the outcome of the election.***" (Jt. Ex. 4)

The Employers promptly filed a Request for Review of that action of the Regional Director with the Board in Washington, D. C. (Tr. 32, Jt. Ex. 8) The Board on December 3, 1963, summarily, without hearing or explanation, affirmed the Regional Director's dismissal. (Tr. 32, Jt. Ex. 9)

In point of time the Trial Examiner's Decision recommending the total dismissal of the July 31, 1963 unfair labor practice charge was issued under date of January 3, 1964, although not received for a number of days thereafter. The Employers reasoned that the bar relied upon earlier by the Regional Director had been removed and on January 30, 1964 once again filed their petition with the Regional Director of the Board seeking a representation election to determine whether or not the Union continued to represent a majority of the Employers' employees. (Tr. 32-33, Jt. Ex. 10(a) is the covering letter and Jt. Ex. 10(b) is the Petition. This became Case No. 19-RM-500). Almost immediately thereafter, under dates of February 5 and February 7, 1964, the Union and General Counsel filed exceptions to the Trial Examiner's Decision. Then, on February 18, 1964, the Regional Director dismissed this second Petition.[7] The Respondent Employers promptly filed a Request for Review of the Regional Director's action with the Board in Washington, D. C. (Tr. 33, Jt. Ex. 12) On April 2, 1964 the Board summarily affirmed the Regional Director. (Tr. 33; Jt. Ex. 13)

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[7] Again the Regional Director, without a hearing, summarily dismissed the Petition in the following language: "As a result of the investigation, it appears that, because there is presently pending in this office unresolved unfair labor practice charge involving the same parties, further proceedings are not warranted at this time. I am therefore dismissing the petition in this matter." (Jt. Ex. 11)

The Respondent Employers on August 26, 1964, declined to further recognize the Union as the collective bargaining agent of any of their employees. (Tr. 38) This was but two days less than two years following the date of certification of the Union by the Regional Director of the Board.

The foregoing relates to the steps that occurred resulting in the Employers' refusal to further recognize and deal with the Union as the bargaining agent of any of their employees as well as the steps that had occurred in the unfair labor practice case filed January 31, 1963, the merits of which are not at issue here.

VI. The Current Unfair Labor Practice Proceedings.

The alleged unfair labor practice which forms the basis for this case was filed by the Union on November 5, 1964. (R. 3) The gravamen of the Complaint and the Amended Complaint is that the failure and refusal of Respondent Employers to continue to recognize and deal with the Union after August 26, 1964 constituted a violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended.

The Trial Examiner considered this matter largely on stipulated facts. He first set forth the rule governing the effectiveness of a Board certification of a union as follows:

> "Certification of a union following a Board-conducted election gives rise to a conclusive presumption of majority (absent unusual circumstances) for a reasonable time, usually for a year, following the date of certification.[8] After the end of the certification year,

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[8] At this point the Trial Examiner footnoted: "Ray Brooks v. N.L.R.B., 348 U.S. 96; Terteling & Sons, Inc., d/b/a Western Equipment Co., 149 NLRB No. 28; Paris Mfg. Co., 149 NLRB No. 8; Ken's Building Supplies, 142 NLRB 235."

the presumption of majority continues, but it is then a rebuttable presumption,[9] and an employer may, if acting in good faith, rebut the presumption."[10] (R. 32-33)

The Trial Examiner then cites the Celanese Corporation case, supra, fn. 10, as setting forth two prerequisites as essential to a finding of an employer's good faith: "(1) There must be some reasonable grounds for believing that the union had lost its majority status since its certification; and (2) the majority issue must not have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that, in raising the majority issue, the employer was merely seeking to gain time in which to undermine the union." (R. 33) The Trial Examiner then reviewed the nature of the premium pay (July 31, 1963) unfair labor practice case, observed that there was neither any allegation nor finding of

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[9] Trial Examiner's footnote: "Bethlehem Steel Company, 73 NLRB 277; Dorsey Trailers, Inc., 80 NLRB 478; Toolcraft Corporation, 92 NLRB 655; Oneita Knitting Mills, 150 NLRB No. 54; Rohlik, Inc., 145 NLRB 1236; F. W. Woolworth Co. Store, 146 NLRB 848."

[10] Trial Examiner's footnote: "Perhaps the use of the word 'rebuttable' in connection with the word 'presumption' may contribute to difficulties in cases where a union's majority status is questioned after the end of the first year following certification. The word 'rebuttable' suggests that an employer who questions a union's majority at this time must come forward with positive proof that the union is no longer the representative designated by a majority of his employees. This is not true; for, if an employer has acted in good faith, he need only present facts which show that he has a reasonable ground for doubt of the majority status of the once certified union. Dixie Gas, Inc., 151 NLRB No. 126; Frito-Lay, Inc., 151 NLRB No. 6; F. W. Woolworth Co. Store No. 2367, 146 NLRB 848; Midwestern Instruments, Inc., 133 NLRB 1132; The Randall Company, Division of Textron, Inc., 133 NLRB No. 289; McCulloch Corporation, 132 NLRB 201; Stoner Rubber Company, Inc., 123 NLRB 1440; Celanese Corporation of America, 95 NLRB 664." (Emphasis supplied.)

bad faith on the part of the Employer involved (C & C Plywood) and ruled that the then pending unfair labor practice charges should not bar the Employers herein from questioning the Union's majority status. (R. 34, 35) Thus, he found that the second of the two prerequisites was met. This was the only facet of the case before the Trial Examiner pressed by the General Counsel and the Union. Although this issue was not raised by the General Counsel and the Respondents proposed evidence to establish a prima facie basis for its good faith doubt, the Trial Examiner found the stipulated facts were not sufficient to warrant the finding that the Employers had reasonable grounds for believing the union had lost its majority status since its certification. (R. 36-39)

The Employers filed Exceptions to the Trial Examiner's Decision; taking no exceptions to the finding that the antecedent unfair labor practice matter should in no manner bar the Employers from questioning the Union's majority status. The Employers limited their exceptions to the Trial Examiner's finding that there was not adequate evidence in the stipulated record to support their good faith belief that the Union had lost its majority status among its employees. Neither the Union nor the General Counsel filed exceptions.

In spite of the fact that no one raised any question concerning the Trial Examiner's finding that the premium pay unfair labor practice matter should in no manner bar the Employers questioning the Union's majority status, the Board rested its decision completely on its one issue, refusing to pass on the sole issue presented to it by the only set of exceptions before it.

The Trial Examiner's Decision was dated September 7, 1965. Employers' Exceptions were dated October 4, 1965. The Decision of the Board is dated April 13, 1967, more than nineteen (19) months following the Trial Examiner's Decision, an inexcusable delay.

Succinctly, the Board ruled: "We find that the prior unfair labor practice was of such character and effect as to preclude Respondents from thereafter questioning the Union's majority status in good faith." (R. 56) The Board then attaches to the facts of the premium pay unfair labor practice case a significance cognizable only in the most sophisticated labor law circles and certainly not so understood among the rank and file employees of this industrial complex. It is from this strained application of the statute that these Respondents resisted enforcement of this Decision of the Board to obtain the review of this Court. (163 NLRB No. 136)

ARGUMENT

I. Summary of Argument.

The Petition for Enforcement should be denied.

The unfair labor practice found by the Board in this case is wholly based upon the effect to be ascribed to the antecedent premium pay unfair labor practice. But for the antecedent premium pay unfair labor practice determination, the Employers would have been granted the orderly processes of the Board to determine whether or not the Union continued to represent a majority of their employees in the bargaining unit. In addition to other objective corroborating factors, the Employers had been told by many of their employees, members of the bargaining unit, that not only they but a majority of the employees in the bargaining unit no longer wished to be represented by the Union. The Employers, to insure a fair and expeditious determination, sought out the orderly processes of the Board petitioning it to conduct a secret ballot representation election. View the conditions that existed at that time. The certification year had expired. The labor contract had been opened (or terminated) by appropriate notice so that it did not constitute a bar. Under the procedures then effectuated by the Board in matters of this kind, such a representation election should have been granted. At that time the mere filing of a representation petition by the employer, without any proof or offer of proof concerning the basis of his good faith doubt of the union's continued majority status resulted in the direction of an election. While that rule has since changed, the objective evidence upon which the Employers then relied, would nevertheless be more than adequate under the present rules to satisfy the requirement of proof that there be a reasonable basis for a good faith doubt of the Union's continued

majority status among their employees. However, the Board refused the representation petition because the unproven premium pay unfair labor practice charge was pending. The Employers continued to recognize and deal with the Union. Subsequently, the Trial Examiner recommended dismissal of the Complaint, charging the premium pay unfair labor practice, finding that no unfair labor practice existed. The Employers again filed a petition with the Regional Director of the Board seeking a secret ballot determination of the Union status. The General Counsel and the Union appealed the decision of the Trial Examiner. The Regional Director refused to process the petition because of the pending premium pay unfair labor practice charge, although dismissal had been recommended by the Board's Trial Examiner. In each instance the Employers filed a Request for Review with the Board which was denied. Ultimately, almost two years after the date of the certification as alleged in the Complaint in this case, the Employers discontinued any recognition or bargaining with the Union.

Thus, but for the premium pay unfair labor practice, first charged but unproven, and certainly not proven at the time the majority status of the Union came into doubt, the issue of the Union's majority status among the employees would have been determined and the policies and purposes of the Act effectuated. The Board's rule, refusing to process a representation petition when an unfair labor practice charge is pending, is not authorized by the Act. It violates the Administrative Procedures Act and it violates the right to due process and a fair hearing. Nothing in the Act relating to its representation functions authorizes the Board to "effectuate the

policies of the Act." Nothing in the Act permits the Board to find the existence of an unfair labor practice until a fair hearing and due process have become an accomplished fact and the preponderance of the testimony supports the finding of unfair labor practices. Only after an unfair labor practice has been found does the Board have the authority to provide a remedy "to effectuate the policies of the Act." At that time, if the unfair labor practice is so grievous and flagrant as to warrant unrestrained sanctions, the Board may order bargaining without an election even though within the immediately prior period an election was held in which the union involved was defeated. Thus, it does not effectuate the policies of the Act to deny an election simply because an unproven unfair labor practice charge is pending. When the rule is examined and it is also noted that the Board will make an exception to it whenever it suits its purposes, or because the charging party has filed a waiver, the rule appears clearly arbitrary and capricious. If the rule is valid, a waiver by the charging party should not warrant setting it aside. Under the application of this rule by the Board, a labor union is given the privilege of governing the procedures of the Board to its selfish ends, which is certainly not the policy or purpose of the statutory scheme.

The finding that the premium pay plan was an unfair labor practice should not later bar a refusal by the Employers to recognize and bargain with the Union. The General Counsel did not establish by any evidence, let alone substantial evidence, that there was any connection between the premium pay plan unfair labor practice and the ultimate loss of majority status by the Union among the Em-

ployers' employees. There is nothing to show that the loss of majority status by the Union was in any manner caused by or connected with the premium pay unfair labor practice. The premium pay plan unfair labor practice itself was neither grievous nor flagrant. The most that can be said for it is that it constituted a "technical" unfair labor practice. There has been absolutely no showing of any anti-union animus on the part of either Employer. There has been absolutely no showing that the direct or indirect purpose of the premium pay plan was to undermine the union, cause disaffection from the union or made in conjunction with other acts designed to accomplish that purpose. The undisputed fact is that the Employer, C & C Plywood, believed in good faith and candid honesty that it had the unequivocal right under specific language of its labor contract with the Union to establish and implement the premium pay plan. The Trial Examiner before whom the witnesses testified in the first instance was satisfied that the conduct of C & C Plywood's manager was completely honest and in good faith. Factually, the evidence is not that there was any intent to avoid the collective bargaining obligation. The situation was, in perspective, one which could be described as "neglecting to bargain" because of a reliance on an erroneous interpretation of the labor contract rather than a "refusal" to do so. No malicious motive, design or scheme designed to injure the Union can be found or legitimately implied in the premium pay plan action of C & C Plywood.

The Board and the Courts have long recognized that there are differences in degree of the gravity of unfair labor practices and, as a consequence, have varied their remedies. To this end,

the Board and the Courts have applied the bargaining requirement with great restraint. Good judgment compels that restraint be exercised in this case and that a bargaining order is not the solution to either the premium pay unfair labor practice matter or this matter.

The underlying policy of the Act is to effectuate the wishes of the employees. Unless it can be shown that the wishes of the employees have been so frustrated by the existence of a prior unfair labor practice that those wishes cannot be given unfettered voice at the time that voice should be heard, then that unfair labor practice should not impair the effectuation of the wishes of the employees. The burden of proof was upon the General Counsel to show, if he could, that the premium pay unfair labor practice prevented the unfettered expression of employee wishes for an unfair labor practice in this case to be found. This he has not done. There has been absolutely no causal relationship shown between the premium pay unfair labor practice and the loss of Union majority status among the employees. Thus, the ultimate withdrawal of recognition from the Union was valid and not an unfair labor practice.

The Board, in its Brief, cites Board authority seeking to extend the certification year because of the Employers' failure to bargain with the Union prior to establishing the premium pay plan. The authorities that it cites uniformly hold two facts in common which are completely distinguishable from the case at bar: (1) in none of those cases had the first collective bargaining agreement been negotiated and executed; and (2) there was a total cessation of recognition of the union or bargaining for an extended period of time. The purpose of a certification is to provide a protective shield under

which the bargaining agent may negotiate its first contract without fear of intervention from a rival organization. The purpose of the certification rule was an accomplished fact in the case at bar. The first collective bargaining agreement had been negotiated and signed. The parties complied with it and the bargaining relationship continued under it without any problems other than the disagreement over whether or not C & C Plywood could establish the premium pay plan. Recognition of the Union was not withheld; bargaining proceeded in all other respects as though there was no difference existing between the parties. Thus, the purpose for extending the certification year found in other cases which gave rise to the Board rule simply does not exist in this case.

The premium pay unfair labor practice is so technical in nature that first the Trial Examiner, later an eminent member of the Board and finally this Court did not believe that it existed. Under such circumstances disaffection from the union should not be imputed as a result of it. In any event, the burden of proving that the premium pay unfair labor practice was the factor bringing about the loss of majority status and thus causing the circumstances of the current case to be an unfair labor practice was that of the General Counsel. This burden he failed to sustain.

In denying the Petition for Enforcement in this matter, it is urged that this Court also modify its Decree in the prior case or in the alternative direct the Board to modify its Order in the premium pay unfair labor practice case. Otherwise the thrust of the Order in the earlier case will result in compelling bargaining when the Union has lost its majority status.

II. The Issue.

The prime issue before this Court is whether or not it should grant the Petition of the National Labor Relations Board to enforce its Decision and Order against the Respondent Employers, C & C Plywood Corporation and Veneers, Inc., herein.

This brings into question, whether or not, in the circumstances of this case, the Board's Order requiring the Respondent Employers to continue to recognize and deal with the labor union, whose majority status among their employees is questioned in good faith and for valid reasons, is correct.

Also fundamental to the determination of the prime issue is the question of whether or not the General Counsel carried the burden of proof before the Trial Examiner and the Board which was upon him to establish that the Employers did, in fact, engage in any unfair labor practices.

The points exceedingly important to the deliberation of this case include:

1. The Employers, as found by the Trial Examiner, recognized and dealt with the certified union for two years, less four days, from certification. (R. 39-40) And, for one year after the certification the Employers had ample objective evidence to support a good faith doubt of the certified union's continuing majority status among its employees.

2. The Employers, in a timely manner, twice sought and were twice denied the orderly and reasonable statutory procedures of the Board to obtain a secret ballot representation election to ascertain the true desires of their employees; first, denied simply because an unproven unfair labor practice charge was pending and,

second denied after the complaint based upon the unfair labor practice charge had been dismissed and before it was appealed to the Board. The Employers' intent to abide by the results of the election is unquestioned.

3. Consider an analysis of the premium pay unfair labor practice ultimately found to exist and its impact upon this situation. For example, does every unfair labor practice charge, proven or unproven, grievous or inconsequential, clearly understood or vague so that its impact upon the employees themselves is highly questionable, merit an equal impact forcing continuance of the bargaining relationship irrespective of the wishes of the employees? Is not the fact that the unfair labor practice is found to exist in a setting totally lacking in malice, bad faith or anti-union animus material to the impact given to that unfair labor practice? Does the fact that the unfair labor practice was found to turn on an interpretation of a labor contract that had long since ceased to exist when the unfair labor practice was ultimately judicially found, warrant frustration of the will of the employees for an unlimited future period of time?

4. Does the finding of an unfair labor practice against but one of the two employers involved in a bargaining unit permit the Board to punish the employees of the innocent employer and the innocent employer by barring them from an orderly determination of the status of the bargaining representative?

5. Procedurally, is the Board free to review an issue resolved by the Trial Examiner under circumstances in which no party takes or files any exceptions to it and the Board provides no indication, notice or hearing that it will consider or review that issue?

III. The Effect of the Board's Certification of Union.

The Union was certified by the Regional Director of the National Labor Relations Board as the collective bargaining agent of the employees of C & C Plywood and Veneers, Inc. on August 28, 1962 following a representation election in which the Union was victor on July 6, 1962. The effect of such a certification is set forth by the Board in Celanese Corporation of America, 95 NLRB 664, 671-2 (1951) as follows:

> "It is appropriate, at the outset, to set forth the legal principles controlling in situations of this type, and particularly to indicate the relationship between the existence of a Board certificate and the right of an employer to question a union's majority in good faith. In the interest of industrial stability, this Board has long held that, absent unusual circumstances, the majority status of a certified union is presumed to continue for 1 year from the date of certification. In practical effect this means two things: (1) That the fact of the union's majority during the certification year is established by the certificate, without more, and can be rebutted only by a showing of unusual circumstances; and (2) that during the certification year an employer cannot, absent unusual circumstances, lawfully predicate a refusal to bargain upon a doubt as to the union's majority, even though that doubt is raised in good faith. However, after the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point rebuttable even in the absence of unusual circumstances. Competent evidence may be introduced to demonstrate that, in fact, the union did not represent a majority of the employees at the time of the alleged refusal to bargain. A direct corollary of this proposition is that, after the certificate is a year old, as in cases where there is no certificate, the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, provided that the doubt is in good faith."

This principle was, in substance, affirmed by the United States Supreme Court in Brooks v. N.L.R.B., 348 U.S. 96 (1954).

Following the Celanese Corporation case, the Board

further clarified the purpose of this certification rule in Ludlow Typograph Co., 108 NLRB, 1463, 1464-5 (1954). That amplification follows:

> "* * *It must never be forgotten that the Act is designed primarily to protect the right of employees to self-organization and that the refusal to conduct an election when a substantial number of employees have indicated a desire to change bargaining representatives is a restraint on that right. Such a restraint for a reasonable period of time, as after a certification, may be necessary to achieve a measure of stability in labor relations, but it should not extend beyond what is absolutely essential for the establishment of sound labor relations. The original reason for the 1 year certification rule was to afford time to the certified union and the employer for negotiating a collective-bargaining agreement free of interference by rival claims of representation. The rule itself was a pronouncement of the Board and is nowhere required by the Act. In the Board's experience, 1 year is adequate time for the certified union and the employer to reach agreement on terms and conditions of employment, if they are ever to do so. But, if the parties are able to agree on a collective-bargaining contract in less than the 1 year allotted, there is no sound reason for saying that they shall have the remainder of the year to make a second or third contract free of interference by rival claims of representation."

The foregoing conclusively illustrates that the prime purpose of the Act is to reflect the wishes of the employees with respect to the matter of their bargaining representative. It also substantiates that the purpose of the certification rule is to permit the negotiation of the first collective bargaining agreement without intervention. Such was accomplished within the certification year in the matter here at bar when negotiation of the labor agreement was completed on April 19, 1963 and that agreement reduced to writing and signed on May 1, 1963. Thus, the application of the Board's rule in Mar-Jac Poultry Co., Inc., 136 NLRB 785 (1962) in the case at bar is

totally inappropriate.[11] In that case the employer absolutely declined to recognize and deal with the union before the certification year had expired and had at no time executed a labor contract with the union. The unfair labor practice of the employer in that case was a most grievous one, a total refusal to bargain by which the employer rejected the principle of collective bargaining espoused by the Act after a bargaining agent had been selected. As the Court noted in N.L.R.B. v. Gebhardt-Vogel Tanning Co., ---F.2d---, 67 LRRM 2364, 2367 (C.A. 7, Jan. 22, 1968):

> "It hardly appears necessary to discuss the principle announced in Mar-Jac Poultry Co., Inc., 136 NLRB 785, upon which the Board relies here. The holding in that case, in substance, is that where a union is deprived of the opportunity to bargain for a substantial portion of the certification year through no fault of its own, the Board may properly extend the union's right to bargain for an equivalent period of time. We assume this is a sound principle, but its utilization is dependent upon the factual situation to which it is sought to be applied."

In the Gebhardt-Vogel case, as in the case here at bar, the Board relied on N.L.R.B. v. Commerce Co. d/b/a Lamar Hotel, 328 F.2d 600 (C.A. 5, 1964) and N.L.R.B. v. Burnett Construction Co., 350 F.2d 57 (C.A. 10, 1965) as illustrating that the Courts have approved this principle of extending the certification

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[11] The Board seeks to apply its Mar-Jac Poultry case rule to this case in its Brief to this Court at pp. 10-11. That case is not only totally inapplicable to the case at bar for the reasons noted above but also there has been no showing in this case that the Employers at any time rejected the principle of collective bargaining or ceased to bargain with the union with respect to all other aspects of their relationship during the balance of the certification year and the term of the collective bargaining agreement. The fact is that the only employer failure in the collective bargaining relationship was C & C's establishment of the premium pay plan which it believed it could inaugurate under the terms of its labor contract with the union.

year.[12] However, in each of those cases no collective bargaining agreement had been reached or entered into during the certification year and there was a total rejection of the principle of collective bargaining with the union involved during that certification year. In the Burnett case the total refusal to bargain occurred within five months of the certification and while it is not clear from either the Board or Court report in the Commerce Co. case, it would appear that bargaining for a first contract ceased within six months of the certification. The first collective bargaining agreement was not brought to fruition in either case.

Thus, it can be readily understood that the Board's rule in it's Mar-Jac Poultry case is totally inapplicable to the case at bar. A first collective bargaining agreement had been reached and was actively governing the relationship of the Employers and the Union well within the first year of certification. Attention is directed to the fact that this labor contract was not a simple instrument nor a cursory effort. It was a comprehensive contract dealing with almost every area

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[12] Board's Brief pp. 10-11, 19-20. Also cited by the Board at pp. 10-11 as supporting this principle are: N.L.R.B. v. Miami Coca-Cola Bottling Co., 382 F.2d 921 (C.A. 5, 1967), N.L.R.B. v. John S. Swift Co., 302 F.2d 342 (C.A. 7, 1962), Superior Engraving Co. v. N.L.R.B., 183 F.2d 783 (C.A. 7, 1950) cert. denied 340 U.S. 930, W. B. Johnston Grain Co. v. N.L.R.B., 365 F.2d 582 (C.A.10,1966) However, each of those cases is equally distinguishable from the case at bar since in none was a collective bargaining agreement negotiated and signed during the certification year and in every case there was a total, even hostile, rejection of the collective bargaining principle within the period in which this first agreement should have been executed. In the case at bar the one Employer involved did not believe that its conduct, which was eventually found to constitute an unfair labor practice, was in any manner in derogation of its collective bargaining responsibility. Instead, it believed that it was in full compliance with its labor contract and its collective bargaining responsibility. It quickly met with the Union when the union made its objections known to the inauguration of the premium pay plan and offered to fully discuss it but the Union declined insisting on unequivocal rescission of the plan.

of the employer-employee relationship. (Jt. Ex. 3) There is absolutely no evidence of any kind that Veneers, Inc. at any time did anything which impugned its complete adherence to that contract. The record also does not show any refusal to completely and totally adhere to the terms of that Working Agreement and to otherwise comply with the principles and purposes of collective bargaining including the complete recognition of the certified labor union by both Employers with but one very technical exception. That exception was the good faith reliance, now judicially determined to have been erroneous, upon its interpretation and application of that portion of the labor contract under which it instituted, unilaterally, the premium pay plan for members of its glue spreader crews. Except for that one incident, both during the first year of the certification and including the additional period through to the end of the first contract, the Employers recognized and dealt with the Union as the bargaining agent of their employees in every particular.[13] To say that that one act caused injury to the bargaining

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[13] The Board Brief (p. 17) is totally irresponsible in characterizing the conduct of the General Manager of both Employers as "flouting of the Union's certification" in his act of unilaterally announcing the premium pay plan. The Employer did so in a good faith reliance upon a provision of its labor contract. The Trial Examiner in his decision in the premium pay case noted: "Despite the contrary contention by General Counsel and the Charging Party's representative, no persuasive demonstration has been proffered that Respondent's management--when it promulgated the disputed premium pay plan for glue spreader crew members--was acting in bad faith." "General Manager Thomason's decision--so far as the record shows--was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it." "Though Respondent's management, clearly, refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore,

agent or tended to undermine the Union's authority is simply to turn one's back on the realities of present day industrial relations. It is unreasonable to assume that any labor union or any employee would read into these honest actions, taken in good faith, in reliance upon clear contract language the existence of conduct aimed at destroying the status of the bargaining agent or its bargaining agency. No labor union and no employee member of a labor union expects to obtain employer acquiescence to every position taken by such a union, whether it be a contractual interpretation, the disposition of a grievance or a demand in bargaining. The failure of the labor union to prevail in every such case or in any such case does no injury to the status of the bargaining agent. A labor union is known for its strong positions and its vehement advocacy of them. This is the substance of which difficult bargaining sessions are made and out of which strikes occur. Certainly in the industrial relations arena it would be inequitable to give the labor union all of these freedoms while tying the employer's hands behind his back and blindfolding him as well.

Admittedly the action that C & C Plywood took in establishing the premium pay plan has now been found to be an unfair labor practice. But, in spite of that, C & C Plywood met promptly with the Union when

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13 (cont.) Respondent cannot be found in default--upon this ground either--with respect to its statutory obligation to bargain." Thus it can be seen that C & C Plywood was not "flouting" the Union's certification. The parties stipulated that official notice be taken in these proceedings of the Trial Examiner's decision and the decision of the Board in the premium pay cases. (Tr. 28) The Board's decision was reported at 148 NLRB 414. The Trial Examiner's Decision is a part of the prior record of this case before this Court in case number 19769.

requested and twice discussed the plan, providing the Union with a forum for the resolution of the matter and an opportunity to thoroughly discuss the matter. The Employer was also willing to discuss the plan in detail but the Union declined to do so. Furthermore, the Employer continued to recognize the Union with respect to all other matters the subjects of bargaining between them and would have negotiated the premium pay plan with the Union if the Union had been willing to do so. Such conduct is not in derogation of the status of the bargaining agent.

The protective purpose of a certification, to give the certified union the unfettered opportunity to reach its first agreement with the employer without fear of a rival organization or employee disaffection intervening, had been fully accomplished in the case here at bar. There was, therefore, no reason to extend that period of protection provided by a certification in this case.

And, as against the protective purposes of the certification the prime purpose of the Act should not be forgotten, for it is not the union's wishes, but those of the employees involved that are supreme. As the Court stated in Philip Carey Manufacturing Co. v. N.L.R.B., 331 F.2d 750, (C.A. 6, 1964):

> "It is appropriate to note here a statement by Judge Friendly in the Superior Fireproof Door case:[14] 'Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself.' * * *"

This also confirms the remarks of the Ludlow Typograph case, supra, that:

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[14] N.L.R.B. v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (C.A. 2, 1961)

> "* * *It must never be forgotten that the act is designed primarily to protect the right of employees to self-organization and that the refusal to conduct an election when a substantial number of employees have indicated a desire to change bargaining representatives is a restraint on that right." (108 NLRB at 1464)

The employee wishes can best be determined and expressed in a secret ballot representation election which the Board unilaterally and arbitrarily denied in this case.

As the Supreme Court stated in Franks Brothers Co. v. N.L.R.B., 321 U.S. 702, 705 (1944):

> "* * *For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See Great Southern Trucking Company v. National Labor Relations Board, 127 F.2d 180, 183.* * *"

While the Board's argument, in its Brief, to impose upon this case its Mar-Jac Poultry case rule has been fully answered herein, it seems to the Respondent Employers that its doing so for the first time in its Brief to this Court is error. Neither the Board in its Decision, nor the Trial Examiner in his, sought to rely upon Mar-Jac Poultry but, instead, relied totally upon one of the aspects of the Board's Celanese Corporation of America case, supra, dealing with whether or not the Employers' questioning of the Union's continued majority status was in good faith. This is another strange aspect of this case. While the Trial Examiner and the Board each relied in their decisions on the application of the rules enunciated in the Board's Celanese Corporation case, the Board's Brief to this Court is completely silent with respect to mentioning that case or its principles. However, since this case in the two prior considerations turned on that case, we now direct this Court's attention to the application of its rules in some depth.

IV. The Employers Questioned the Union's Majority Status and Ultimately Declined Further Bargaining with the Union in GOOD FAITH.

A. Introduction

Both the Trial Examiner and the Board turned the Decision that each rendered in this matter on the application that each placed upon the good faith test enunciated by the Board in Celanese Corporation of America, 95 NLRB 664 (1951). In that decision (at p. 673) the Board set forth the rule as follows:

> "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. But, among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union has been certified. There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status since its certification. And, secondly, the majority issue must not have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union."

The Trial Examiner found that the Employers satisfied the second test set forth above but did not satisfy the first test. The Board, on the other hand, concerned itself first with the second test and disagreed with the Trial Examiner claiming the Employers here did not satisfy that test, then finding it unnecessary to rule on the application of the first test to the case at bar.

B. The Employers had Reasonable Grounds for Believing the Union had Lost Its Majority Status among their Employees.

Applying the tests of the Celanese case, the first requires that the Employers must have "some reasonable grounds for believing

that the union had lost its majority status since its certification."

The pertinent stipulated facts, which clearly show that the Employers here had more than was required under Board rules to establish reasonable grounds for believing the union had lost its majority status, is found in the following portion of the hearing transcript:

> "It is also stipulated and agreed that the Respondent Employers in the matter here pending would produce witnesses, the substance of their testimony being that it became known to officials of Respondent Employers and to employees around the operation of the Respondent Employers here involved that many employees no longer wished to be represented by Local Union No. 2405; that many employees, including many hired after the date of the certification of the union, were and are openly opposed to Local Union No. 2405 continuing as the bargaining agent of the employees of the Respondent Employers in the unit found appropriate for collective bargaining by the Regional Director of the Board in Case No. 19-RC-3041. That such witnesses, members of the bargaining unit, would testify that in their opinion a majority of the employees in the unit found appropriate no longer wished to be represented by the union (Local 2405) and so informed management officials of these Respondent Employers. That the factual circumstances giving rise to Respondent Employers' claim of doubt arose in the period beginning on or about July 15, 1963, and has continued at all time pertinent to this matter thereafter to and including the time of this hearing. Respondent Employers would produce testimony which would show that there were one hundred forty-five employees in the collective bargaining unit found appropriate at the time of the representation election held July 26, 1962, one hundred thirty-four of whom were eligible to vote in that election. On September 3, 1963 there were two hundred and one employees in the collective bargaining unit found appropriate of which seventy-eight were in the employ of the Respondent Employers in July, 1962. On February 7, 1964 there were one hundred eighty-four employees in the collective bargaining unit found appropriate of which sixty-eight

were in the employ of the Respondent Employers in July, 1962." (Tr. 28-30) [15]

And, while the foregoing is more than adequate to substantiate that any reasoning being would find such facts adequate to support a good faith doubt of the Union's continued majority status among the employees of the Employers, that fact is emphasized by the exchange of correspondence between the Employers and the Union under dates of March 11, 1964 and March 12, 1964 in which the Union declined to independently establish its continued majority status. (Jt. Ex. 18 and 19)

What more does an employer need to give rise to "reasonable grounds for believing that the union has lost its majority status since its certification?" Here the Employers had (1) the representation by a number of employees within the bargaining unit that they did not wish to be further represented by the union; (2) the representation by a number of employees within the bargaining unit that such was not just their own feeling but that of a majority of the employees within the bargaining unit; (3) that there was open opposition to the union's

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[15] The Trial Examiner erroneously construed this portion of the stipulation as an offer of proof. (R. 36, 37) An examination of the stipulation illustrates that in acceding to the stipulation the General Counsel did not question the authenticity or the veracity of the testimony stipulated to by the parties. Instead, he simply objected to its introduction "on the grounds of relevancy to the issues involved in this matter and does so object; however, if his objection is overruled, it is stipulated that such would be the testimony of several witnesses." (Tr. 30) The Trial Examiner turned his decision on the question of the Employers' factual basis for questioning the Union's continued majority status among the employees. (R. 38) Thereby he overruled General Counsel's objection to the relevancy of this evidence so that the portion objected to became evidence in these proceedings, not an offer of proof. Furthermore, there is nothing in the stipulation to indicate that this was presented to the Trial Examiner as an offer of proof in any event.

continued representation within the plant involved by many of the employees within that bargaining unit; (4) that there had been a substantial change in the number and in the personnel composing the workforce within the bargaining unit since the certification; (5) the witnesses upon which the Respondents relied included "members of the bargaining unit" so that the evidence was concrete and not based upon theoretical assumptions or as the Trial Examiner sought to characterize them "wishful thinking." (R. 38); (6) that all of these factors were known to the management of the Employers; and, (7) the correspondence with the Union of March 11 and 12, 1964 confirmed the Union's own doubt of its continued majority status.

Certainly such factors would be more than adequate to establish a good faith doubt of the Union's continued majority status among employees under the rules that have been developed by the Board since this case arose.

At the time that this case arose, the Board was applying the rule in representation matters that when an employer requested an election to determine whether or not a certified bargaining agent continued to be the majority representative of its employees, the existence of a good faith doubt on the part of the employer involved was not to be litigated and actually the employer had to provide no proof even administratively to the Board to establish the validity of his good faith doubt. This rule prevailed during the period in which these Employers were questioning the continued majority status of this Union in the period from August 28, 1963 through August 24, 1964. It was not until the Board's decision in U. S. Gypsum Co., 157

NLRB 652 (March 11, 1966) that the Board changed this rule with respect to representation matters before it so as to equalize the application of this rule in both unfair labor practice matters and in representation matters.

In the U. S. Gypsum case (at pp. 654-5) the Board set forth this distinction and eliminated it in the following language:

> "The Board has long held that a question concerning representation is raised with respect to the status of an incumbent union if an employer files a petition under Section 9(c)(1)(B) and shows only that the union has claimed representative status in the unit and the Employer has rejected or otherwise questioned that status. In so holding, the Board has not, in such representation proceedings, questioned the good faith of the employer's refusal to grant to the union continued recognition.* * * On the other hand, in unfair labor practice cases the Board has consistently held that there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of certification; that thereafter the presumption is rebuttable, and an employer may lawfully refuse to bargain only if it can show by objective facts that it has a reasonable basis for believing that the union has lost its majority status since its certification.* * *"

The Board concluded (at p. 656):

> "In light of the above, we are of the view that we should no longer adhere to the former interpretation of Section 9(c)(1)(B). We therefore now hold that in petitioning the Board for an election to question the continued majority of a previously certified incumbent union, an employer, in addition to showing the union's claim for continued recognition, must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification.* * *"

Subsequently, in a later case involving the same parties, i.e., U. S. Gypsum Co., 161 NLRB No. 61 (Oct. 28, 1966) the Board further clarified this rule. It held that the employer's reasonable basis for doubting the union's continued majority status among the employees need not be litigated. Instead, it held that the objective

evidence was to be submitted by the employer to the Regional Director of the Board and that the Regional Director was to administratively determine the adequacy of that objective evidence. Actual practice under these decisions in the same Region of the Board in which this case arose illustrates that the evidence submitted by the Employers in the case at bar would be considered more than adequate to establish a reasonable, good faith doubt of the union's continuing majority. This Region has been consistently satisfied administratively with the provision by the employer, normally in written form, of the names of the employees who represent to the management of the employer that they and, in their opinion, a majority of the employees in the bargaining unit no longer wish to be represented by the incumbent union.[16] (Exchange Lumber & Manufacturing Co., Case No. 19-RM-697, decided by the Regional Director on January 2, 1968 and Request for Review by the union involved denied by the Board on January 31, 1968. Ahsahka Lumber & Milling Co., 19-RM-666, election held May 19, 1967. Post Falls Lumber Co., 19-RM-663, election held May 18, 1967. Unfortunately, each of these are unreported decisions.)

As a consequence of the foregoing, it is established that

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[16] Because the Board treats an employer's probing of its employees wishes with respect to continued union representation with the utmost circumspection, the employer should not be expected to know more or show more than that which is voluntarily conveyed to it by its employees. Employer interrogation can, by itself, lead to independent unfair labor practices or bar the Board's holding of a representation election. (N.L.R.B. v. Lorben Corp., 345 F.2d 346, C.A. 2, 1967; Struksness Construction Co., 165 NLRB No. 102, 1967; Union News Co., 112 NLRB 420, 1955; Blue Flash Express, Inc., 109 NLRB 591, 1954. Cf. Stoner Rubber Co., 123 NLRB 1440, 1959, in which the Board recognizes these limitations on an employer.)

these Employers did have ample objective evidence upon which to rely in forming their good faith belief that the Union no longer represented a majority of their employees.[17]

C. The Question of the Continuing Majority Status of the Union among the Employees was NOT Raised in a Context of Illegal Antiunion Activities.

That portion of the Celanese rule to which this discussion is pointed is stated:

> "* * *And, secondly, the majority issue must not have been raised by the employer in a context of illegal anti-union activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." (95 NLRB 673)

This rule is prefaced earlier in the same paragraph by the statement that the issue of whether an employer has questioned a union's majority in good faith "can only be answered in light of the totality of all of the circumstances involved in a particular case." (Emphasis supplied.)

The Trial Examiner found that the Employers here satisfied the requirements of this prerequisite to establish their good

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[17] The Trial Examiner appears to rely on Laystrom Manufacturing Co., 151 NLRB 1482 (1965) that the Employers' factual basis for a good faith doubt of the Union's continued majority was "tenuous." (R. 35, 37) However, in the Laystrom case the employer sought to show that various employees had indicated dissatisfaction with the union but refused to name any of those employees so that the Trial Examiner there rejected the testimony because the General Counsel would have no opportunity to meet the testimony and the employer there did not except from that ruling. Here, on the other hand, witnesses who were members of the bargaining unit would have appeared on the witness stand so that there would have been no question of who was testifying and the General Counsel would have had every opportunity to cross examine and to meet the testimony with his. The factual situation of the Laystrom case thus is totally distinguishable from the case here at bar.

faith. The Board, on the other hand, disagreed relying solely upon its antecedent premium pay unfair labor practice finding. (R. 56)

The Board's application of this test, in the circumstances of this case, defies reason and good judgment.

First, the Board relies upon an unfair labor practice finding which not only this Court in a unanimous decision (351 F.2d 224), but an eminent member of the Board itself (Boyd Leedom) and a competent Trial Examiner of long tenure (Maurice M. Miller) did not believe to exist. If the factual situation upon which the unfair labor practice finding rests is so difficult to understand that men learned in this area of jurisprudence cannot agree that one exists, it is an absurdity to say that the impact of such an unfair labor practice impugns the good faith of the so-called perpetrator of the unfair practice.

Secondly, under these circumstances, where learned men skilled in this area of jurisprudence cannot agree that an unfair labor practice exists, it cannot be said that factory workers, members of the bargaining unit, are so affected by the so-called unfair labor practice conduct as to cause their disaffection from the union.

Third, the posture within which the unfair labor practice was found to exist totally denies that the employer involved had even the remotest dream that his conduct in any manner either constituted an unfair labor practice or would be interpreted as an effort to undermine the union. The most thorough examination of the antecedent unfair labor practice case will not turn up one iota of evidence that the employer's conduct was not in good faith, or surrounded by a general aura of antiunion animus, or made in conjunction with other

acts which manifested a plan to destroy the union or that it entertained any antiunion hostility, or that it rejected the principle of collective bargaining. Certainly the "totality of all of the circumstances" vindicates these Employers and destroys the Board's application of the Celanese rule.

Fourth, the unfair labor practice found to exist in the antecedent case was against but one of the Employers involved in the bargaining and in no manner affected the other Employer or its employees. Why, then, should all of the employees and the innocent Employer be barred from a determination of the true wishes of the employees because of a highly technical unfair labor practice?

Fifth, the totality of the conduct of the Employers illustrates conclusively that there was no aim to cause union disaffection among the employees and no attempt to gain time in which to undermine the union.

There is absolutely nothing in the record which indicates that the Employers or either of them ceased to recognize and bargain with the Union after inaugurating the premium pay plan on May 20, 1963. The record of the earlier case shows that the Employer, C & C Plywood Corporation, met twice with the Union shortly after the Union first objected to the adoption of the plan. While the Union steadfastly insisted that the plan be rescinded, which the Employer refused, it nonetheless indicated a willingness to discuss the plan, how it worked, what changes might be adopted, etc., for the plan itself was announced simply as a temporary measure to be tried for a couple of months. But the Union was obstinate, it wanted the plan revoked, so it filed its unfair labor practice charges. Bargaining

with the Union continued without interruption. The Union's authority was in no manner questioned by anyone through the balance of the term of the labor contract. Grievances were processed and bargaining was handled as though the antecedent unfair labor practice had not occurred. When the Employers did notify the Union of their intent to terminate the labor contract upon its anniversary date, November 1, 1963, more than fourteen months following the certification, their letter made it clear that the contract would be enforced to that date and that bargaining would continue, as before.[18] The Employers then filed their Petition with the Regional Director of the National Labor Relations Board clearly illustrating that they were not going to reject the Union unilaterally and without a fair determination of whether or not the Union, in fact, continued to represent a majority of their employees.[19] The Regional Director, without a hearing or other notice, refused to process the petition simply because an unproven, actually a highly speculative, unfair labor practice was pending. The Employers promptly followed the only course open to them under

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[18] See n. 6, p. 7 supra.

[19] The failure of an employer to invoke the Board's processes by filing a petition to determine the status of the Union as bargaining representative has been held to be an indicia of the employer's lack of good faith. Toolcraft Corporation, 92 NLRB 655, 656, n. 5 (1950); United States Gypsum Co., 90 NLRB 964, 968 (1950). Conversely, the Court in N. L. R. B. v. Dan River Mills, Inc., 274 F.2d 381, 389 (C.A. 5, 1960) said: "Under the special circumstances of this case, it was reasonable for the Employer to assume that the law would resolve his good faith doubt concerning the Union's majority by the election requested and shortly ordered. The subsequent dismissal of these proceedings with the filing of the unfair labor complaint cannot deprive his interim actions of that cloak of reasonableness and good faith doubt.* * *"

the Rules and Regulations of the Board and filed a Request for Review with the Board itself in Washington, D. C. (Rules and Regulations, National Labor Relations Board, Series 8, Rev. Jan. 1965, Sec. 102.67, 29 CFR 102.67(b)ff) The Request for Review was denied. After the Trial Examiner dismissed the complaint, based upon the antecedent unfair labor practice allegation, the Employers once again sought to obtain an orderly and peaceful resolution of the Union's bargaining agency status. Even though no appeal of the Trial Examiner's Decision was then pending, the Regional Director refused to process the Petition and the Employers again filed a Request for Review with the Board in Washington, D. C. That the Employers' conduct throughout this period was not considered to constitute or be evidence of a refusal to bargain or an unfair labor practice is further illustrated by the allegation of the Complaint and Amended Complaint in these proceedings which fixes the date upon which the Employers' refusal to recognize and deal with the Union occurred "on and after August 26, 1964." (R. 5, 14) The fact that the Employers sought to resolve this matter within the processes of the Board and did not unilaterally take the matter into their own hands until long after it became apparent that the Board was not going to perform its statutory responsibility to determine the status of the bargaining representative further establishes the good faith of the Employers herein.

The pendency of an unfair labor practice has not always prevented the processing of a petition for a representation election before the Board nor barred an employer from refusing to grant further recognition to a union when the employer has satisfactory

evidence that the union has lost its majority status with the employees. The two cases relied upon by the Trial Examiner in this case in deciding that the premium pay unfair labor practice finding should not bar the Employers' questioning of the Union's continued majority status bears this out.

In the first case, Mission Manufacturing Co., 128 NLRB 275 (1960) the employer was found to have engaged in a refusal to bargain unfair labor practice by barring union representation on grievances during the existence of a strike by that union. Thereafter, the number of employees crossing the picket line became so great that the employer refused further recognition of the union. The Board held that the unfair labor practice did not bar the employer's good faith refusal to recognize the union because it no longer represented a majority of its employees. It is noteworthy that the Board, in the case at bar here, in its reversal of the Trial Examiner, failed to comment on the Trial Examiner's reliance on the Mission Manufacturing case.

The second case cited by the Trial Examiner was Midwestern Instruments, Inc., 133 NLRB 1132 (1961). In that case the employer had the practice of granting merit wage increases. The certified union, by letter, acquiesced in that practice for a period of eight months.[20] The union then rescinded its letter but the employer, nonetheless, continued its practice, refusing to make merit wage increases the subject of bargaining with the union. The union ultimately struck and a considerable number of employees

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[20] Not nine months as indicated by the Board in its decision. (R. 58, n. 12)

declined to honor the union's picket line. The employer filed a representation petition seeking an election and the union filed unfair labor practice charges. In disposing of this case, the Board stated (at p. 1132):

> "We find, as did the Trial Examiner, that the refusal to bargain concerning merit increases constitutes a violation of Section 8(a)(5) of the Act. We agree with the Trial Examiner that with the exception of Respondent's refusal to negotiate regarding merit increases the allegations of the consolidated complaint are without merit. As we are, therefore, finding that Respondent has lawfully questioned the Charging Union's majority status, we shall not issue the usual order, as recommended by the Trial Examiner, requiring the Employer to bargain with the Union upon request. We shall, instead, order the Respondent to bargain with respect to wages, rates of pay, hours and other conditions of employment, and specifically merit increases, when requested to do so by a majority representative of its employees.* * *" [21]

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[21] The Board, in its decision, erroneously set aside the Trial Examiner's reliance upon the Midwestern Instruments case. (R. 58, n. 12) The Board stated: "There was no showing that employees were aware of the union's withdrawal of consent, and, hence no basis for inferring that the union's authority and prestige as their collective bargaining representative were undermined by such merit increases as were thereafter granted." But, the Board must not have read that case carefully for in the Midwestern Instruments case, the Trial Examiner said: "I do not think that it can reasonably be inferred that such a refusal, assuming it was known to the employees, which created in impasse in the bargaining relations, contributed to any defection among union members. I do not think that a finding can be made per se that any unfair labor practice committed by an employer, however unrelated to the union membership and activity of the employees, inevitably contributed to loss of membership. Since an employer commits an unfair labor practice when he contracts with a minority union he should not be caught on both horns of the dilemma." (133 NLRB at 1143, emphasis supplied.) Since the Board affirmed the Trial Examiner's findings in this respect, its findings were based on the assumption that the unfair labor practice refusal to negotiate merit increases with the union was known to the employees. To have said that the employees were totally unaware of an employer's refusal to negotiate merit increases with the union or that the union's rescission of its consent to unilateral consideration of such increases would imply that the union either acted within a vacuum or without authority in rescinding its consent.

It is respectfully submitted that both of the foregoing cases are clearly in point and formulate a very persuasive precedent for the disposition of the case at bar. There is nothing shown in the case here at bar that the refusal to rescind the premium pay plan in any manner created an impasse or caused a termination in bargaining between the parties. The very fact that the parties had two meetings following the inauguration of the premium pay plan and otherwise administered and worked under their labor contract for many months thereafter fully rebuts any assumption that the premium pay unfair labor practice adversely affected the relationship of the parties or the relationship of the employees with their bargaining agent.

Certainly the unilateral granting of a series of merit increases, the employer having granted 94 in a 12 or 13 month period in the Midwestern Instruments case, would more readily come to the attention of employees and have aroused the open intervention of the union within its membership meetings and councils and would have a greater impact upon the bargaining relationship than would the single, isolated act of one of the two Employers involved in the case at bar in the establishment of the premium pay plan for a single group of employees (the glue spreader crews). It must be kept in mind at all times that the premium pay plan that C & C Plywood established at no time reduced or eliminated the agreed minimum rate for the jobs involved and there was absolutely no compulsion put upon any employee or any crew to meet the norms required to qualify for the premium pay. The simple payment of a premium over and above the contractual rate to reward employees for a special

fitness, skill, aptitude and the like is not apt to have an adverse impact upon the union's continued bargaining status.

But, the two cases cited by the Trial Examiner are not the only cases where the Board has chosen to permit the questioning of the continued bargaining status of a union in the face of an existing unfair labor practice or practices by the employer. This is developed further herein under the heading commencing near the bottom of this page.

D. The Rule of the Celanese Case satisfied in this Case at Bar.

By reason of the foregoing it is well established that a fair and reasonable application of the rules enunciated by the Board in the Celanese case results in the finding that (1) the Employers here had not only "some reasonable grounds for believing that the union had lost its majority status since its certification," which is all that is required by the Celanese case, but had substantial reasonable grounds for such a belief. And, (2) the issue of the Union's majority status was in no manner raised in a context of illegal anti-union activities. Nor had the Employers engaged in any conduct aimed at causing employee disaffection from the union or to gain time to undermine the union. Applying the very facts of the Celanese case to the case at bar, these Employers were entitled to refuse to bargain further with the Union and to legally question its continued majority status among their employees.

V. The Board's Rule Under Which It Refuses to Process Representation Petitions when Unfair Labor Practice Charges are Pending is Improper.

This phase of this discussion is an extension of the analysis of the Board's ruling that the premium pay unfair labor practice (both before and after the finding of its ultimate existence) constituted

a valid basis for it to bar the Employers from questioning the Union's majority status among their employees. This becomes important because the Board, arbitrarily and without hearing or really good reason, barred the Employers from obtaining an orderly and reasonable determination of the wishes of their employees as to whether or not the Union should continue as their bargaining agent. The Board ruled thusly purportedly because: First, there was an unproven unfair labor practice charge pending; Second, the unfair labor practice charge had been dismissed but the aggrieved had filed an appeal; and, Third, the unfair labor practice was ultimately established, sans any aura or manifestations of anti-union animus, absent any attempt to undermine the union, to cause disaffection for the union among the employees, or to gain time to undermine the union. The Employer questioned the Union bargaining status on August 28, 1963, but did not effectuate its refusal to deal further with the Union until after November 1, 1963.[22] Had the election been held, it was likely that the determination would have been known prior to November 1, 1963. Had the Union won, it would still have been the bargaining agent and the parties could have worked out their differences with

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[22] The Employers' letter to the Union raising the question of the Union's continued majority status set forth that the Employers would continue to recognize and deal with the Union as the bargaining agent of their employees through November 1, 1963 and that recognition would cease at that time. (Jt. Ex. 4) However, with the Board's refusal to process the Employers' petition, the recognition of the Union was continued and bargaining continued intermittently, but when requested by the Union, and grievances were processed with full recognition of the Union as bargaining agent until August, 1964 which is the likely reason that the Union's charge of unfair labor practices giving rise to this case at bar was not filed until November, 1964.

respect to the negotiation of their second labor agreement and the confusion and uncertainty that has reigned from November 1, 1963 to this date, over four years later would have been avoided. On the other hand, had the Union lost the election, while the Employers would have had no obligation to bargain with the Union until such time as it or another Union was recognized as bargaining agent, nothing would have prevented the Board, under its authority in Section 10(c) of the Act, to have ordered a resumption of recognition and bargaining if it was found that the unfair labor practice was so grievous that in order to effectuate the purposes of the Act such an order was necessary. The parties certainly would not have been in any worse relationship to each other or with respect to the employees than they are now as a consequence of the extended litigation involving this matter.

An examination of Section 10(c) of the Act makes it abundantly clear that the Board has the authority to "effectuate the policies of the Act" after it has found the existence of an unfair labor practice, not before it has made such a determination. While it is true that the Board is an administrative agency of government it exercises quasi-judicial functions and in that capacity it should not provide to those who come before it any lesser consideration than that given the most common criminal in our midst, i.e., that all are innocent until proven guilty.

The Act takes great pains to assure that the findings of the Board must be supported by "substantial evidence." (Sec. 10(e) The Board is admonished in the Act: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person

named in the complaint has engaged in or is engaging in such unfair labor practice, * * *" it shall act. (Sec. 10(c) All of this means nothing if the Board can, prior to the accused's day in court, deny him the orderly statutory processes and functions for which the Board is designed.

An analysis of the rule is found in Columbia Pictures Corp., 81 NLRB 1313, (1949), a case often cited by the Board and the Courts in reference to this rule. There the Board said (at pp. 1314-15):

> "It is true, as asserted by the Intervenor, that the Board does not, as a general practice, direct an election during the pendency of an unfair labor practice charge affecting the unit involved in the representation proceedings, absent the filing of waivers by the charging party. This practice is, however, a matter which lies within the discretion of the Board, as part of its function of determining whether an election will effectuate the policies of the Act, and is not required by the Act or by the Board's Rules and Regulations. Accordingly, an exception may be made to the general practice when, in certain situations, the Board is of the opinion that the direction of an immediate election will effectuate the policies of the Act.
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> "On the basis of the particular facts in this case, we are of the opinion that it will best effectuate the policies of the Act, and promote the orderly processes of collective bargaining, to direct an immediate election herein, despite the pendency of the unfair labor practice charges and the refusal of the Intervenor to file waivers with respect thereto. Accordingly, we shall direct an immediate election."

Attention is directed to the fact that nowhere within the authorities granted to the Board in the conduct of representation elections is an authority granted to the Board to "effectuate the policies of the Act," the keystone to its belief that it has authority to withhold such election procedures. The only place under the Act where the Board has the authority to take action to "effectuate the policies of the Act" is found in Section 10(c) of the Act and that is

after (not before) the Board has "upon the preponderance of the testimony taken" concluded that the person charged has engaged or is engaging in any such unfair labor practice.

Further reasoning establishing the arbitrary and capricious nature of this rule is found in the fact that it can be set aside by the one who files the unfair labor practice charge by his simply filing a waiver as the quoted portion of the Columbia Pictures Corp. case illustrates.[23] If the rule were sound, its exceptions would be few, if any, and certainly the waiver is not going to change the remedy of the Board if an unfair labor practice is untimately found.

As already noted, the exceptions to the foregoing rule are legion. The Columbia Pictures case also so illustrates for after stating the rule, the Board then decides it will not apply it "on the basis of the particular facts in this case." In American Metal Products Co., 139 NLRB 601 (1962) the rule was set aside because to have refused to hold the representation election would have disenfranchised permanently replaced economic strikers, individuals who had lost their jobs and whose future interest in the enterprise and in those who had crossed the picket lines was of a most tenuous nature. The rule was set aside in West-Gate Sun Harbor Co., 93 NLRB 830 (1951) because the unfair labor practice charge was filed

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[23] See also Carlson Furniture Industries, Inc., 157 NLRB 851 (1966); Schlachter Meat Co., Inc., 100 NLRB 1171 (1952). The Board, however, will customarily direct an election if the unfair labor practices are dismissed prior to the issuance of a complaint even though there is an appeal of that decision to the General Counsel, which further illustrates the nebulous application of this rule. Happ Manufacturing Co., 124 NLRB 202 (1959); California Spray-Chemical Corp., 123 NLRB 1224 (1959). The rule is not applied if an 8(e) unfair labor practice is charged. Holt Brothers, 146 NLRB 383 (1964)

too near the date of the scheduled representation election. If the rule is sound, it is sound irrespective of the date of the representation election. But the rule is not sound for it permits a party to file a "blocking" charge, a charge that blocks the Board's procedures automatically thus frustrating the very intent and purpose of the Act which is to solve not to hinder the solution of labor-management problems. Examples of this practice are also myriad. A union engages in a long, unsuccessful strike. The employees seek a decertification election or in consequence of employee behest, the employer files its petition. The union files its blocking charge and the Board, through its investigative processes searches into every activity of the employer to find some basis for supporting the charge. A complaint may be filed on a basis discovered by the Board's investigators unrelated to the charge filed by the party desiring to block the representation proceeding, and the wishes of the employees are soon forgotten in the melee that follows. Or the union may realize that it has lost its majority status and to gain time to reorganize the employees, it files the blocking charge.

True, these are matters which can be legislatively corrected but it is not necessary to await the slow and deliberate legislative processes for there is no legal basis for the Board's procedures in this regard at this time so that judicially the Board can be admonished to discontinue it. As noted, this is material to these proceedings because of the frustration and uncertainty that has been caused in this very matter because the Board declined to process either of the validly filed representation petitions.

The Courts have found the rule to be unsound. In N.L.R.B.

v. Minute Maid Corporation, 283 F.2d 705, 710 (C.A. 5, 1960) the Court said:

> "* * *The union cannot avoid the consequences of a loss of representation by the mere filing of an unfair labor practices charge against the employer. Nor is the Board relieved of its duty to consider and act upon application for decertification for the sole reason that an unproved charge of an unfair labor practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented. * * * The Board's wrongful refusal to act upon the decertification petition should not put Minute Maid in a position of refusing to bargain in good faith. The Board suggests that Minute Maid should have discussed with the Union the question of the Union's majority. This question is a fact question; it is a question which the Board is required to determine. It is not something to be bargained.* * *" (Emphasis supplied.)

Another Court, in a later decision, acted upon the assumption that the rule announced in the Minute Maid case disposed of the question and that the Board was compelled to process a representation or decertification petition, whether or not an unfair labor practice charge had been filed. N.L.R.B. v. Warrenburg Board and Paper Corporation, 340 F.2d 920, 924 n. 5 (1965).

The Board, in its brief, would have this Court believe that this rule is widely accepted and adhered to by this and other Courts.[24] But, the cases cited either simply allude to the fact that the Board has the rule or that the circumstances of the case are such that the employer's illegal acts were flagrant and the Court believed application of the rule to be proper under the Board's authority in connection with its disposition of unfair labor practice matters. Thus, in N.L.R.B. v. Trimfit of California, Inc., 211 F.2d 206 (1954)

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[24] Board's Brief at p. 18.

this Court observed that the employer acknowledged that it had discharged four employees because of their union activities. The employer there "pursued a course of conduct that evidences a clear violation of the Act's good faith requirements." (211 F.2d at 210) There this Court held that the employer's conduct clearly rendered a free election impossible. The factual situations of every one of the cases cited by the Board are completely distinguishable from the case at bar. In N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303 (C.A. 5, 1960) the employer had totally and completely refused collective bargaining over a long period of time under circumstances in which it was found that it should have bargained. Flagrant unfair labor practices were present in Furrs, Inc. v. N.L.R.B., 350 F.2d 84 (C.A. 10, 1967), International Telephone and Telegraph Corp. v. N.L.R.B., 382 F.2d 366 (C.A. 3, 1967), and N.L.R.B. v. Miami Coca-Cola Bottling Co., 382 F.2d 921 (C.A. 5, 1967). The rule was simply recited or alluded to in N.L.R.B. v. Local 182, Teamsters Union, 314 F.2d 53 (C.A. 2, 1963) and Surorenant Manufacturing Co. v. Alpert, 318 F.2d 396 (C.A. 1, 1963). In none of these cases did the Court examine the rule to determine its validity under the Act. Simply to acknowledge the existence of the rule does not approve it, particularly where reference to it is largely dictum.

The lack of depth and substance to this rule is further evidenced by comparison with the impact that should be given to the specific unfair labor practice found to exist. The Courts have held that the commission of an unfair labor practice, as such, simply does not bar an employer's doubt of the union's majority status. Nor, has it been held that the commission of an unfair labor practice, per se,

compels recognition of the union as bargaining agent. Thus, the Court in N.L.R.B. v. S. S. Logan Packing Co., 386 F.2d 562, 570 (C.A. 4, 1967) said:[25]

> "In those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had, the Board may have the power to impose a bargaining order as an appropriate remedy for those unfair labor practices. * * * The remedy is an extraordinary one, however, and, in light of the guaranty of Section 7 of employees' rights not to be represented, its use, if ever appropriate, must be reserved for extraordinary cases."

While the foregoing case involved the judicial rejection of a Board order directing recognition of a union under circumstances where the union did not hold bargaining rights, its principle is equally applicable to the case at bar. There the employer was found to have engaged in unfair labor practices by conducting coercive interrogation and surveillance. The Court held that those unfair labor practices could be remedied without barring the unfettered use of the statutory scheme for the conduct of a representation election to determine the true wishes of the employees in the security of anonymity. Nor is this principle without Board support. In a recent case the Board found that a series of what it regarded as "widespread and flagrant unfair labor practices" on the part of an employer nevertheless did not warrant a bargaining order. J. P. Stevens & Co., Inc. 167 NLRB No. 37 (Aug. 31, 1967).

The Court in N.L.R.B. v. Flomatic Corp., 347 F.2d 74

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[25] This case was recently cited with approval by this Court in Don the Beachcomber v. N.L.R.B., ---F.2d---, 67 LRRM 2551, 2552 (Feb. 7, 1968)

(C.A. 2, 1965) analyzed a large number of cases in which the Board and the Courts reviewed the imposition of a bargaining mandate as the penalty for the commission of unfair labor practices and concluded that such a remedy "should be applied with restraint." (347 F.2d at 79) The Court noted (at p. 78):

> "A bargaining order, however, is strong medicine. While it is designed to deprive employers of a 'chance to profit from a stubborn refusal to abide by the law,' * * * and although it undoubtedly operates to deter employers from adopting illegally instrusive election tactics, its potentially adverse effect on the employees' Section 7 rights must not be overlooked. * * * That section protects the right of employees to join or refrain from joining labor organizations. And that right is implemented by Section 9(c)(1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undernine the freedom of choice that Congress wanted to guarantee to employees, and thus frustrate rather than effectuate the policies of the Act.
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> "The facts of this case provide an illustration. The Board's disagreement with its own Trial Examiner on the purport and effect of Rice's letter certainly compels the conclusion that we are not presented with a flagrant violation of the Act. There was no aggressive or planned campaign aimed at dissipating union strength by resort to threats, discharges or refusals of recognition. * * *"

In the face of this precedent, the Board order in the case at bar takes on a cloak of unreasonable administrative fiat. It also illustrates the totally indefensible nature of the rule barring a determination of a union's continued majority status in the face of any unfair labor practice for the remedy to be applied in light of a judicially determined unfair labor practice is the only statutory basis for the Board's denial of its bargaining representative determining processes.

VI. The General Counsel did not sustain the Burden of Proof that Employers engaged in Unfair Labor Practices. Board's Finding of an Unfair Labor Practice is not supported by Substantial Evidence nor a Preponderance of the Testimony.

It is fundamental that the General Counsel has the burden of proving that an employer has engaged in conduct which constitutes an unfair labor practice.[26] The rule is well stated by this Court in the Sebastopol Apple Growers case, supra, n. 26, in which this Court said:

> "* * *The burden was on the General Counsel to establish the unlawfulness of respondent's actions, not upon the respondent to establish its actions were lawful." * * * (269 F.2d at 712)
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> "The Trial Examiner might have operated the cannery differently. But the respondent had the right to determine for itself how its business was to be conducted. Management may make wise decisions or stupid ones, and it is of no concern of the Board unless they are unlawfully motivated.* * *" (269 F.2d at 712-13)

In N.L.R.B. v. Winter Garden Citrus Products, 260 F.2d 913, 916 (C.A. 5, 1958) the rule was stated thusly:

> "It is not and never has been the law that the Board may recover upon failure of the Respondent to make proof. The burden is on the Board throughout to prove its allegations, and this burden never shifts. It is, of course, true that if the Board offers sufficient evidence to support a finding against it, a respondent, as stated in the quotation first above, stands in danger of having such a finding made unless he refutes the evidence which supports it. But it is wholly incorrect to say or suggest that the burden of showing compliance with the act ever shifts to the respondent. The burden of showing no compliance is always on the Board.* * *"

In this same connection, the rule is also clear that findings of the Board must be supported by substantial evidence in the record considered as a whole. Thus, the United States Supreme Court

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[26] N.L.R.B. v. Sebastopol Apple Growers Union, 269 F.2d 705 (C.A. 9, 1959); N.L.R.B. v. McGahey, 233 F.2d 406 (C.A. 5, 1956); N.L.R.B. v. Kaiser Aluminum & Chemical Corp., 217 F.2d 366 (C.A. 9, 1954).

stated in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951):

> "* * *Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Earlier on the same page, the Court noted:

> "* * *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * *"

The obligation of the General Counsel here was first to establish that the Union did in fact represent a majority of employees at the time the Employers questioned that majority. As the Board itself has stated in Stoner Rubber Co., 123 NLRB 1440 (1959):

> "It is elementary that in a refusal to bargain case the General Counsel has the burden of proving the union's majority. In the present case, the General Counsel introduced no evidence of majority status except the certification issued to the Union on May 24, 1956, approximately 14 months before the alleged refusal to bargain. Generally a certification is absolute proof of majority for one year following its date of issuance. After the lapse of the certification year, the certification creates only a presumption of continued majority. This presumption is rebuttable. Proof of majority is peculiarly within the special competence of the union. * * *An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continuing majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal to bargain date the union in fact did represent a majority of employees in the appropriate unit."

The Employers here came forth with "sufficient evidence to cast

serious doubt on the union's continued majority status." The General Counsel, however, made no effort, beyond the effect to be placed on the certification, which was at least 14 months old when recognition and bargaining was first sought to be terminated, to establish the existence of a union majority. He thus failed in carrying the burden of proof in this element of the case.

The foregoing is further confirmed by the Court in N. L. R. B. v. Electric Furnace Co., 327 F. 2d 373, 376 (C.A. 6, 1964) wherein it stated:

> "If an employer has well-founded doubts about a union's majority status, and no unfair labor practice on the part of the employer has caused this loss of majority, the employer may, at the end of the Union's certification year, refuse to bargain further with the union. * * * (Citing cases.)" (Emphasis supplied.)

The burden is upon the General Counsel to show that the unfair labor practice involved did cause the loss of majority status, if it did. In this case he neither proved it nor tried to prove it.

In addition, separately, the General Counsel had the burden of proving, by substantial evidence, that the Employers failed and refused to bargain collectively with the Union in contravention of Sections 8(a)(1) and (5) of the Act. This he has not done. There is no substantial evidence in this matter to support the Trial Examiner's finding that the Employers did not have a reasonable basis upon which to form a good faith doubt of the Union's continued majority status among the employees. Moreover, there is a total absence of substantial evidence to support the Board's finding that the premium pay unfair labor practice is in any way connected with the Union's loss of majority status. The most that can be said either for the General Counsel's case or the Board's decision is that it is based on the

suspicion or the assumption that there was a causal connection between the premium pay unfair labor practice and the loss of majority status by the Union, but it was not even partially proven. It could not be proven because it did not exist.

In N.L.R.B. v. Houston Chronicle Publishing Co., 211 F.2d 848, 854-5 (C.A. 5, 1954) the Court stated the applicable rule as follows:

> "* * *When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion, this is not such a case."

Or, as this Court stated in N.L.R.B. v. Citizen-News Co., 134 F. 2d 970, 974 (1943):

> "* * *Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding."

Examining the evidence upon which the General Counsel relied and upon which the Board relied we find its precariously narrow base to consist of the premium pay unfair labor practice finding; nothing more, nothing less. Yet, the mere existence of an unfair labor practice has not barred the Board or the Courts on many prior occasions from permitting the determination or redetermination of the bargaining status of a labor union or from finding no illegality in the later cessation of recognition by an

employer.[27] And in those cases the existence of the unfair labor practice could be considered far more grievous or flagrant than the truly technical unfair labor practice found with respect to the premium pay unfair labor practice. Thus, the effect of the unfair labor practice, based on fact not on speculation, together with the circumstances that surround it becomes the key to whether or not it should bar the legitimate questioning of the majority status of the Union involved. As a consequence, when the totality of the evidence here is considered, it is readily apparent that the General Counsel has not sustained the burden of proof incumbent upon him and there is not substantial evidence in the record, considered as a whole, to support the Board's unfair labor practice finding.

VII. Miscellaneous Considerations.

There are also other considerations incidental to the consideration of the issue presented in this matter worthy of this Court's evaluation.

The rules of the Board strictly limit the issues that may be raised before the Board when appealing from the Decision of a Trial Examiner. While the Trial Examiner's Decision is generally written in the form of a recommendation, it becomes final if no exceptions are taken to it. An examination of these rules and the Statements of Procedure of the Board, leaves but one conclusion, namely that an issue not raised by one of the parties in its exceptions to the

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[27] N.L.R.B. v. S. S. Logan Packing Co., supra; N.L.R.B. v. Marcus Trucking Co., 286 F.2d 583 (C.A. 2, 1961); N.L.R.B. v. Superior Fireproof Door & Sash Co., supra; N.L.R.B. v. Minute Maid Corp., supra; N.L.R.B. v. Dan River Mills, Inc., supra; N.L.R.B. v. Adhesive Products Corp., 281 F.2d 89 (C.A. 2, 1960); Midwestern Instruments, Inc., supra; Mission Manufacturing Co., supra.

Board will be considered closed.[28] An examination of this case, however, shows that no one questioned the Trial Examiner's rationale or conclusion with respect to his finding that the Employers did not raise the question of the Union's continuing majority status among the employees in a context of illegality. The Board, however, unilaterally, without notice or issue before it, reversed the Trial Examiner on that issue and that issue alone. Certainly if a party to the case, such as the Employers here, had known that that finding would be made the basis for reversing the Trial Examiner, or in fact would have been considered at all, that party would have made it a point to present matter to the Board with respect to it.

The only issue in this case presented to the Board was the issue of whether or not the Trial Examiner's finding that the Employers did not have adequate objective evidence to form a good faith doubt of the Union's continuing majority was valid or not. Yet the Board actually never passed on that issue but chose to ignore it. No notice was given to anyone that it would even consider the issue

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[28] See Rules and Regulations, N.L.R.B., Series 8, Sec. 102.46(h), 29 CFR 102.46(h): "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding." See also Statements of Procedure, N.L.R.B., Series 8, Sec. 101.12(b) and (c), 29 CFR 101.12(b) and (c): "(b) If no exceptions are filed to the trial examiner's decision, and the respondent does not comply with its recommendations, his decision and recommendations automatically become the decision and order of the Board, pursuant to section 10(c) of the act, and become its findings, conclusions, and order. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes. (c) If no exceptions are filed to the trial examiner's decision and its recommendations and the respondent complies therewith, the case is normally closed but the Board may, if it deems it necessary in order to effectuate the policies of the act, adopt the decision and recommendations of the trial examiner."

prior to receipt of its decision. In the face of this conduct, the Board now publicly asks that a more conclusive status be given to Trial Examiner's Decisions.[29] Such an appeal is empty when the Board itself chooses to disregard the finality of the Trial Examiner's Decision with respect to an issue from which no exceptions are taken.

The Act guarantees to the employer a right to a representation election, subject to the rules of the Board. Those rules are clearly to be such as are necessary for the orderly processing and holding of elections. The Employers here fully complied with the published and known rules of the Board with respect to their request for an election.

Nothing in the legislative history of the Act indicates that it was contemplated by Congress that the Board should have total freedom to reject a petition otherwise properly founded.

The fact that Veneers, Inc., a separate entity, and its employees were not a party, directly or indirectly to the premium pay unfair labor practice proceedings is also a material factor to this case. The Board seeks to pass this off on the basis that the same individual is General Manager of both firms and that both firms were deemed jointly to be the employer of the appropriate bargaining unit determined by the Board. Yet, the decision made by this General Manager with respect to the premium pay matter was made solely in his capacity as General Manager of C & C Plywood and not as General Manager of Veneers, Inc. The premium pay case in no manner named or referred to Veneers, Inc. as a party. The Board

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[29] From the text of a speech by Chairman of the Board, Frank W. McCulloch on February 15, 1968 at the Federal Bar Association and the George Washington University National Law Center Labor Relations Institute in Washington, D. C. (67 LRR 183)

in its efforts here completely neglects to consider the rights or the equities of Veneers, Inc. and its employees. The isolated act of C & C Plywood in the premium pay matter pales to insignificance when the entire matter is viewed in perspective. In spite of this, the Board seeks to extend the effects of that act upon Veneers, Inc. and its employees. The two companies objected strenuously to being made joint employers or a single employer for the convenience of the Board and the Union in the initial instance. (Tr. 26, Jt. Ex. 2) The fact that the Employers chose in the circumstances not to seek a review of the Regional Director's determination in no manner made that decision so conclusive that questions concerning it could not be raised later. Amalgamated Clothing Workers v. N.L.R.B., 365 F.2d 898, 904 (C.A.D.C. 1966)

With respect to footnote 11 on page 12 of the Board's Brief, attention is directed to the fact that the number of employees in the bargaining unit had risen to 201 on September 3, 1963 so that the figure given for July 26, 1962 by the Board permits the possibility of a distortion in the understanding of this matter. (Tr. 29)

There had been no case law to substantiate the Board's theory, that reliance upon an interpretation of a contract, made in good faith, nevertheless permits the Board to interpret the contract in determining whether or not an unfair labor practice exists before the decision in the prior premium pay unfair labor practice case. Such a new rule, or new law, should not be given an impact sufficient to completely frustrate the wishes of the employees and the relationship of the Employers with their employees. Since it has now become law that the Board is free to pass upon an other-

wise valid, good faith interpretation placed on specific labor contract language, the Board must expect that there will be changing relationships and attitudes between the time that the difference of opinion arises over the contractual interpretation and the ultimate effectuation of the remedy. Under such circumstances, the Board cannot expect to freeze the bargaining relationship without consideration of the ever changing wishes of the employees.[30] Differences normally arise over the manner in which given contractual language should be interpreted. When these differences arise in good faith and without the addition of other factors demonstrating that the interpretation is spurious, not in good faith and otherwise in a posture of anti-union animus, unfair labor practices will result which in fact have little, if any, effect upon the disaffection of employees from the union. Thus, in these cases, the Board must not hastily thrust the bargaining remedy upon the parties for it can, as in this case, do more to frustrate the policies of the Act, than to effectuate them.

VIII. The Remedy.

It is respectfully submitted that the Board's decision finding an unfair labor practice in the matter before this Court cannot be upheld in the face of the Board's own precedent and the application of the appropriate law. Thus, the Complaint in this matter should be ordered dismissed and the Petition for Enforcement denied.

Additionally, however, there is the matter of the Board's Order in the prior premium pay unfair labor practice case which

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[30] In his speech referred to in n. 29 Chairman McCulloch said: "The law does not make the choice of employees irrevocable; it permits them at appropriate times to abandon collective bargaining or to change their bargaining agent."

should also be recognized in these proceedings for it compels bargaining with the Union here involved by indirection. Such bargaining now, in the face of the Union's loss of majority status, would actually frustrate rather than enhance the policies and purposes of the Act. That Order provides that the Employer, C & C Plywood, "will not fail to refuse to bargain collectively" with the Union "by unilaterally instituting a premium pay plan for glue spreader crews," etc. (Case No. 19,769 before this Court, 351 F.2d 224, decree entered August 31, 1967 in response to the mandate of the Supreme Court.)

As noted by the Court in N.L.R.B. v. Flomatic Corp., 347 F.2d 74, 77 (1965):

> "* * *However, the Board's action is not insulated from judicial review where it has applied 'a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.' N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953); see also, Local 60, United Bhd. of Carpenters v. N.L.R.B., 365 U.S. 651 (1961); Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938)."

It has been determined that C & C Plywood engaged in an unfair labor practice in its unilateral announcement of the premium pay plan. However, the fact that it did so under its good faith belief that it was permitted to do so within the rights reserved to it under its labor contract and the fact that there has been absolutely no finding of any anti-union animus, hostility, effort to undermine the union or cause disaffection from the Union are all important mitigating circumstances which, at least, place the unfair labor practice found in the category of a "technical" unfair labor practice. This distinction was judicially recognized in N.L.R.B. v. Citizens Hotel Co., 326 F.2d 501, 505 (C.A. 5, 1964):

> "There was, therefore, an impermissible unilateral change constituting a failure to bargain.* * * (Citing cases.) But this refusal to bargain must here be characterized as a 'technical' one in the since that although the action violates the law because of its consequences, it was not an instance of deliberate, purposeful refusal to engage in negotiations having the genuine aim of bringing about an agreement. We put emphasis on this because the actual nature of the failure to bargain bears significantly on the remedy to be imposed by the Board."

Since all of the parties to the earlier case are also before this Court in this case, and that case is a material factor to the case at bar, in an effort to avoid circuity of litigation, in the circumstances of this case, since the loss of the Union's majority status was not contributed to by the earlier unfair labor practice, it is urged that this Court direct the Board to revise its Order in the premium pay case. It is suggested that the policies of the Act will be effectuated to simply require that C & C Plywood, in any future bargaining relationship with any certified labor union, not refuse to bargain collectively with such labor union with respect to the institution of any premium pay plan for any of its glue spreader crews upon request. Of course, the paragraph dealing with this subject in the Notice to Employees should also be amended accordingly, assuming it is believed necessary that such a Notice be posted to effectuate the policies of the Act. The references to not interfering with, restraining or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act, while of questionable necessity, could remain without revision. There is adequate precedent. The Courts have judicially reviewed the Board's Orders and Remedies and have chosen to modify them. N.L.R.B. v. Flomatic Corp., supra.; N.L.R.B. v. Logan Packing Co., supra.; Philip Carey Manufacturing Co. v.

N.L.R.B., supra.; and many others. Additionally, the Board itself has issued orders compelling an employer found to have engaged in a violation of Section 8(a)(5) to perform certain acts upon the advent or readvent of a bargaining representative while not compelling bargaining with that union at the time. Midwestern Instruments, Inc., supra.

CONCLUSION

Based upon the foregoing, the Respondent Employers respectfully submit that the Board has erroneously adjudged an unfair labor practice to have been committed by the refusal of these Employers to recognize and bargain further with the Union after they had adequate reason to question the continued majority status of the Union.

It is respectfully urged that the Petition for Enforcement be denied and that the decree of this Court direct a modification of the order of the Board in the prior premium pay unfair labor practice case so as not to subvert the will and desires of the employees with respect to their choice of bargaining representative, if any.

Respectfully submitted,

George J. Tichy
Attorney for Respondents

March 15, 1968

APPENDIX

In addition to the provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) set forth in Appendix A of the Board's Brief, the Respondent believes that the following provisions of that Act are also relevant:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * *

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.[31]

George J. Tichy
Attorney for Respondents

[31] In preparing this Brief, the first offset printed brief by this counsel to this Court, the Clerk's Office was consulted with respect to whether or not quoted material and footnotes mandatorily would be double spaced. It was determined that practice before this Court appears to except from the rule that all typed matter shall be double spaced both footnotes and quoted material. This also appears to be the practice in other Courts. Thus this brief was prepared accordingly.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GARY HERBERT VOLLICK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,306

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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For the District of Arizona

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IN THE
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On Appeal from the Judgment of
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BRIEF FOR APPELLEE

I.
JURISDICTION

Appellant was indicted on June 14, 1967, for a violation of the Dyer Act, 18 U.S.C. §2312, and for impersonation of a federal officer, 18 U.S.C. §912. Record on Appeal, hereinafter "RC," Item 1. On motion of the United States, Count II, the impersonation count, was dismissed on July 28.

Appellant was tried by jury and found guilty on July 28. RC, Item 4. On August 7 defendant's post-trial motions were denied and he was adjudged guilty and sentenced. RC, Items

5, 6. Notice of appeal was filed on August 17, 1967. The trial court had jurisdiction under 18 U.S.C. §3231, and this court has jurisdiction by virtue of 28 U.S.C. §1291 and 28 U.S.C. §1294.

II.

STATEMENT OF FACTS

On June 2, 1967, one Norris Pennington met Vollick at the request of a mutual friend in order to help Vollick get settled in El Paso. Transcript of Trial, hereinafter "TR," p. 18. They accordingly went to Budget Rent-A-Car in El Paso on June 2, where Vollick applied to rent a car for a couple of days. TR 20. When asked his employment, Vollick falsely stated that he was a clerk at the Federal Correctional Institute at La Tuna. TR 20; TR 46; Government Exhibit 3. Pennington then signed an agreement renting a 1967 Plymouth Barracuda bearing license plate CPL-103. TR 19; Government Exhibit 1. Vollick was present when Pennington signed the agreement, TR 19, which called for return of the car by June 5, and Vollick was designated as an additional driver. Government Exhibit 1, RC 3. Pennington turned the car over to Vollick for use in El Paso so that Vollick could contact his prospective employer, get an apartment and some food, TR 21, 25, and be ready to go to work the next Monday morning, TR 27. Vollick told Pennington that he would have the car back by 6:00 p.m., Sunday, June 4. TR 22. Nothing was said about Vollick taking the car into New Mexico or Arizona. TR 21-22.

By 11:00 p.m. on June 2, Vollick had travelled to Safford, Arizona, where he was seen in the cocktail lounge of the Buena Vista Hotel. TR 48. Four days later, on June 6, 1967, Vollick was stopped for a minor traffic violation while driving the car west on U.S. Highway 70, approximately

eleven miles west of Pima, Arizona, TR 34, 36. When questioned by Highway Patrolman Matthews, Vollick claimed that he was the registered owner of the car and that his address was La Tuna, Texas. TR 36.

On or about June 6, at Ranch Trailer Sales in Chandler, Arizona, Vollick and a woman picked out a house trailer which they stated they intended to buy. TR 39. Vollick personally filled out a credit application for the trailer indicating that he was the owner of a 1967 Plymouth Barracuda. TR 41; Government Exhibit 2.

On June 8 Vollick was arrested while in possession of the car in Safford, Arizona, TR 49, and lessor's records contain no indication that Vollick had attempted to get an extension of the date on which the car was due back. TR 16-17; Govetnment Exhibit 1.

III.

OPPOSITION TO SPECIFICATION OF ERROR

1. The trial court properly denied the defendant's motion for judgment of acquittal because the Government's evidence was sufficient to take to the jury the question of whether the appellant formed an intent to steal the car.

2. The trial court properly denied the defendant's post-trial motions because the evidence supported the verdict.

3. The trial court did not err in giving its instructions on what constitutes "stealing" under the Dyer Act.

IV.

SUMMARY OF ARGUMENT

1. The evidence was sufficient to take the case to the

jury and for it to find that the appellant intended to steal the car and thereafter transported it in interstate commerce.

2. The trial court appropriately instructed the jury that a defendant need not, in order to "steal," intend permanently to deprive an owner of his vehicle, but, rather, that it is sufficient if the defendant did not intend to return the automobile, but instead intended to use it for his own purposes so long as it served his convenience and thereafter to dispose of it or abandon it.

V.

ARGUMENT

1. The evidence was sufficient to take the case to the jury and for it to find that the appellant intended to steal the car and thereafter transported it in interstate commerce.

The first two specifications of error essentially attack the sufficiency of the evidence. Appellee contends that the evidence was sufficient.

The word "stolen" as used in the Dyer Act "includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership." *United States v. Turley*, 352 U.S. 407, 417 (1957). The offense can be committed even though acquisition is lawful if the intent to deprive the benefits of ownership is thereafter formed and the car is then transported in interstate commerce. E.G., *Gerber v. United States*, 287 F.2d 523 (10th Cir. 1961). It is settled that a "taking" under the Dyer Act can occur though possession is acquired by means of a rental agreement, e.g., *Berard v. United States*, 309 F.2d 260 (9th Cir. 1962), and that a defendant's intention, at the time he rented the automobile and when he first transsported it in interstate commerce, can

be shown by his subsequent conduct. *United States v. Dillinger,* 341 F.2d 696, 698 (4th Cir. 1965).

Courts have given weight to facts and circumstances similar to those of our case in affirming Dyer Act convictions. Thus, *United States v. Weir,* 348 F.2d 453, 454 (4th Cir. 1965), and *United States v. Dillinger,* supra, rely in part on false representations regarding employment at the time of leasing. Similarly the extensive distance travelled from the place of acquisition was a factor in *Smith v. United States,* 233 F.2d 744, 747 (9th Cir. 1956), and in *Breece v. United States,* 218 F.2d 819 (6th Cir. 1954). *United States v. Diodati,* 355 F.2d 806 (4th Cir. 1966), noted that there was no indication in the lessor's records that the lessee had communicated with the lessor regarding an extension of the return date. And *Turner v. United States,* 248 F.2d 948 (5th Cir. 1957), was based partially upon a false representation to a highway patrolman regarding ownership.

Appellee accordingly contends that Vollick's conduct made the case one for the jury. At the time of renting he falsely stated that he was a clerk at La Tuna; he almost immediately thereafter drove across New Mexico and into Arizona contrary to the understanding that he was to use the car in El Paso; he apparently failed to contact the lessor for an extension of the due date; and while in Arizona he, on two occasions, cliamed ownership of the car. Appellee submits that these facts, in the view most favorable to the Government, warranted sending the case to the jury for their determination of Vollick's intention when the car was transported in interstate commerce, and constitute substantial evidence in support of their verdict. *Bouchard v. United States,* 344 F.2d 872, 876 (9th Cir. 1965); *Cape v. United States,* 283 F.2d 430, 433 (9th Cir. 1960).

2. The trial court appropriately instructed the jury that a defendant need not, in order to

"steal," intend permanently to deprice an owner of his vehicle, but, rather, that it is sufficient if the defendant did not intend to return the automoble, but instead intended to use it for his own purposes so long as it served his convenience and thereafter to dispose of it or abandon it.

The instruction which the court gave on "stealing" under the Dyer Act was substantively correct. *United States v. Turley,* supra; *United States v. Dillinger,* supra. In light of the evidence discussed above, Appellee submits that the instruction clearly was appropriate.

In any event, no objection to the instruction was made before the jury retired, and since it was not plain error Rule 30, F.R.Crim.P., precludes assignment of it as error. *Goldsby v. United States,* 160 U.S. 70, 77 (1895); *Lewis v. United States,* 373 F.2d 576, 579 (9th Cir. 1967); *Holm v. United States,* 325 F.2d 44 (9th Cir. 1963).

VI.

CONCLUSION

It is respectfully submitted that the conviction should be affirmed.

Respectfully submitted,

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

PHILIP FAHRINGER
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

PHILIP FAHRINGER
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this 5th day of January, 1968, to:

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No. 22,305

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

C & C PLYWOOD CORPORATION AND VENEERS, INC.,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is directed to certain contentions in the Companies' brief not fully treated in our opening brief.

A. The Board's Unfair Labor Practice Findings Are Valid and Proper

1. The Companies misconceive the import of the Supreme Court decision in *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, rehearing denied, 386 U.S. 939. The Court did not reverse this Court "relying upon the absence of an arbitration clause" (Co. Br. 4) but only referred to this circumstance to distinguish that case from this Court's decision in

Square D Co. v. N.L.R.B., 332 F.2d 360, and in order to show that the Board's action was not "inconsistent with its previous recognition of arbitration as an instrument of national labor policy to compose contractual differences" (385 U.S. at 426). See also the Court's approval (*ibid.* fn. 10) of *Cloverleaf Div. of Adams Dairy Co.*, 147 NLRB 1410, 1416, where, notwithstanding an existing contractual arbitration provision, the Board remedied the employer's denial of the union's statutory right to be notified and consulted about changes in working conditions.[1]

Equally incorrect is the Companies' intimation that the unfair labor practice in the prior case was "highly speculative" (Br. 38) and that the violation was of a minor nature because it did not reduce wage rates (Br. 42) and its impact upon employees was "highly questionable" (Br. 20). The Companies further err in arguing that the unilateral action was "taken in good faith, in reliance upon clear contract language" (Br. 26), and in equating it with disputes concerning "a contractual interpretation, the disposition of a grievance or a demand in bargaining." (*Ibid.*). These contentions are contrary to the Court's emphasis on the "limited discretion which the Labor Act allows employers concerning the wages of employees represented by certified unions" (*loc. cit.* 425 n. 7); to its holding at 429, n. 15, that "* * * the real injury in this case is to the union's status as bargaining representative"; and to its rejection of the employer's contract interpretation (*loc. cit.* 430-431). See also our opening brief pp. 13-14. We note, moreover, that a unilateral increase in wages is as much a violation of Section 8(a)(5) as a unilateral reduction since both minimize the value of the union in the minds of the employees. *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217,

[1] C & C Plywood Co. argued in its petition for rehearing (p. 13) that the emphasis placed on the "absence of arbitration appears to have been a paramount consideration in the ultimate decision of this Court * * * [and that] such consideration was completely and totally foreign to any necessary evaluation or decision in this matter." Presumably, the Supreme Court did not agree with this contention.

223-225; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 383-386; *N.L.R.B. v. Katz*, 369 U.S. 736, 740-742.[2]

2. Consistent with their attempt to belittle the Supreme Court's decision in 385 U.S. 421, *supra*, the Companies argue (Br. 22-24, 28, 34, 50) that they could refuse to recognize, and bargain with, the Union after the expiration of the certification year because the violation of Section 8(a)(5) found by the Supreme Court was only of a minor and technical nature. They further claim that for this reason the Board's certification did not remain valid and binding upon them pursuant to the rule in *Mar-Jac Poultry Co.*, 136 NLRB 785, and the cases upholding it, as set out in our opening brief pp. 10-11, 14-15.

We submit that there is no valid distinction between the violation of Section 8(a)(5) committed by C & C Plywood (hereafter "C & C") during the certification year and the facts underlying the decisions relied on in our opening brief where employers were ordered to continue bargaining with a union after the certification year. As the Supreme Court has said in *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 211:

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management disputes to the mediatory influence of negotiation. * * * [Footnote omitted.] The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43.

There is simply no way to achieve the ultimate purposes of the Act if, after the employees have chosen a representative,

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[2]The petition for rehearing took a totally different view of the unfair labor practice finding's probable impact, claiming that the decision "imposes a pandora's box filled with potential industrial relations chaos" and that it "* * * creates a national system of compulsory arbitration in total disregard of the actual will of Congress". (At p. 36.)

the employer remains free to act unilaterally. It is also immaterial that the employer's unilateral action in violation of Section 8(a)(5) occurs after a collective bargaining contract has been executed. The Company's contrary contention (Br. 25-28) flies in the face of the ruling in *Fibreboard, supra*, and numerous other cases holding that the duty to bargain collectively with the designated representative does not cease with the execution of a collective bargaining contract.[3] And insofar as the Companies argue (Br. 50-51) that C & C's violation was less far reaching than in the cases relied upon in our opening brief, it is enough to point out that in *N.L.R.B. v. Katz*, 369 U.S. 736, 740-741, the violation consisted in granting several benefits, such as merit increases and sick leave, and that in *N.L.R.B. v. John S. Swift Co.*, 302 F.2d 342, 344, 346 (C.A. 7), the previous violation resulting in an extension of the certification year amounted to nothing more than the refusal to furnish the union with data found pertinent to unresolved issues which were the subject of bargaining negotiations. See also *N.L.R.B. v. John S. Swift Co.*, 277 F.2d 641, 645 (C.A. 7).

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[3] *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 424-426; *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436; *J.I. Case Co. v. N.L.R.B.*, 253 F.2d 149, 153, where the Seventh Circuit held that "*collective bargaining is a continuous process* which, 'among other things, * * * involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.' *Conley v. Gibson*, 1957, 355 U.S. 41, 46. * * * A collective bargaining agreement thus provides 'the framework within which the process of collective bargaining may be carried on.' *Timken Roller Bearing Co. v. N.L.R.B.*, 1947, Sixth Cir., 161 F.2d 949, 955." (Emphasis the Court's). See also *N.L.R.B. v. Western Wirebound Box Co.*, 365 F.2d 88 (C.A. 9), involving the duty to furnish information in connection with the negotiation of amendments to existing labor agreements, and *Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716 (C.A. 2), as to an employer's duty to permit access to the plant as part of its duty to furnish information in connection with the administration of an existing contract—the violation of which duty constitutes a refusal to bargain regardless of the existence of a labor agreement and regardless of the otherwise harmonious relations between union and employer.

Moreover, the certification year has been extended where the bargaining relationship had broken down without a violation on the part of the employer. See cases cited at p. 11 and footnote 10 of our opening brief.

The Companies' entire brief is permeated with the contention that their refusal to meet with the Union must be tested by the standard of whether they acted in subjective good faith and by whether the Supreme Court's unanimous decision in 385 U.S. 421 could have been foreseen.[4] Such argument does not avail at all, for where, as here, a party refuses to meet and negotiate because of an erroneous view of the law, the frustration of the statutory bargaining requirements is complete and there is no occasion even to consider the party's subjective good faith. *N.L.R.B. v. Katz*, 369 U.S. 736, 743, and other cases cited at pp. 20-21 of our opening brief. Since that standard does not apply to the situation here involved, it is immaterial that it does apply in varying degrees in proceedings where a violation of Section 8(a)(1) or 8(a)(3) is at issue, and the numerous cases cited by the Companies dealing with the last named provisions of the Act are not in point and need not be discussed in detail.[5]

It is also immaterial that C & C was willing to discuss the terms of the unilaterally instituted premium pay plan with

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[4] See Co. Br. pp. 11, 16 ("absolutely no showing of any anti-union animus on the part of the employer"), 18, 20, 24-25, 36-38, 50, 55-56, 60-61, 62.

[5] *N.L.R.B. v. Citizen-News Co.*, 134 F.2d 970 (C.A. 9); *Don the Beachcomber v. N.L.R.B.*, __ F.2d __ (C.A. 9, 67 LRRM 2551, 57 L.C. Par. 12,493 (no violation of Section 8(a)(5) based on Section 8(a)(1) findings which were rejected by this Court); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F.2d 705 (C.A. 9); *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366 (C.A. 9); *N.L.R.B. v. McGahey*, 233 F.2d 406 (C.A. 5); *N.L.R.B. v. Winter Garden Citrus Products Corp.*, 260 F.2d 913 (C.A. 5), where the court rejected the Section 8(a)(1) findings and held at 917-918 that the Board's Section 8(a)(5) findings were "makeweights thrown in to furnish background support for the findings of discrimination."

the Union (Br. 25-27), for, as noted by the Supreme Court C & C refused to rescind the plan during the discussions (385 U.S. 421, 424.). In any event, "it is clear from the record that * * * [the employer] took its unilateral action * * * before it met and conferred with the union on this action. The Board properly found this to be in disregard of its statutory obligation." *N.L.R.B. v. Central Illinois Public Service Co.*, 324 F.2d 916 (C.A. 7), enforcing *Central Illinois Public Service Co.*, 139 NLRB 1407, where the Board held at p. 1417, that "* * * the bargaining philosophy of the Act requires that good-faith negotiations precede rather than follow changes in bargaining conditions of employment." See also *Fibreboard, supra,* 379 U.S. at 213-214; and *Stark Ceramics, Inc. v. N.L.R.B.*, 375 F.2d 202, 206 (C.A. 6).[6]

The cases relied upon by the Companies where Section 8(a)(5) findings of the Board were overruled are inapposite. In *N.L.R.B. v. Gebhardt-Vogel Tanning Co.*, __ F.2d __, 67 LRRM 2364, 57 LC. Par. 12,431 (C.A. 7) (Co. Br. 23), the Court did not take issue with the Board's power to extend the certification year where there was "a factual basis" for finding that the employer had violated Section 8(a)(5) during the certification year by delay in furnishing

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[6]The Companies formally withdrew recognition of the Union as of November 1, 1963, as announced in their letter of August 27, 1963. (See our opening brief pp. 6 and 14, n. 12.) They now argue that "except for that one incident, both during the first year of the certification and including the additional period through to the end of the first contract * * * [they] dealt with the Union as the bargaining agent of their employees in every particular" (Br. 25); that "grievances were processed and bargaining was handled as though the antecedent unfair labor practice had not occurred" (Br. 38), and that "the parties * * * administered and worked under their labor contract for many months" after the unilateral introduction of the premium plan (Br. 42). The record is barren of evidence to support these contentions. Moreover, these allegations, if proved, would not affect the duty of the Companies to continue bargaining with the Union until the unfair labor practice has been remedied, and for a reasonable period thereafter. (See our opening brief pp. 9-11.)

information. However, the Court held that the employer was entitled to a hearing on the question of whether this certification-year unfair labor practice had in fact occurred; that the Board erred in basing its finding that this did occur on a show-cause order instead; and that in the absence of evidentiary support for such finding the extension was unjustified and the employer had not violated Section 8(a)(5) by refusing to bargain after the end of the original certification year because of a suspected loss of majority. Similarly, in *N.L.R.B. v. Electric Furnace Company*, 327 F.2d 373 (C.A. 6), (Co. Br. 55) the Court held that the unfair labor practice charge alleging refusal to bargain during the certification year was barred by the six-months statute of limitations (Section 10(b) of the Act), and that the employer's doubt as to the loss of the union's majority status after the lapse of that year was in good faith in view of the lawful discharge of nearly all employees in the unit. *N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (C.A. 5) (Co. Br. 56), decided April 9, 1954, involved reversal of the Board's finding that statements by supervisory employees were coercive in violation of Section 8(a)(1), and of the finding that the employer's replacement of its circulation department by an independent contract system was motivated by a desire to avoid bargaining with the union. The court held that such change was motivated by business reasons and that the resulting discharge of the circulation employees did not violate Section 8(a)(3). On the basis of these holdings the court further found (at p. 855) that the employer did not violate the Act by thereafter refusing to bargain with the union for a unit of employees which included the validly discharged circulation employees.[7]

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[7]It is significant that the Fifth Circuit several days previously had held in *Armstrong Cork Co. v. N.L.R.B.*, 211 F.2d 843, 847-848, that the granting of individual merit increases without prior consultation with the union constituted, without more, a violation of Section 8(a)(5). (Additionally, the court found separate violations of Section 8(a)(1) and (3).)

The Companies' argument (Br. 40-41) that the Board erroneously distinguished its decision in *Midwestern Instruments, Inc.*, 133 NLRB 1132 (R. 58), is unpersuasive. In that case the employer refused to bargain over merit increases since September 1960, after a 9 months' period of good faith bargaining on other issues during which the Union acquiesced in the unilateral granting of merit increases. *Loc. cit.* at 1135, 1140. In the meantime 162 out of 333 employees in the unit had gone on strike at least as early as August 1960, some 40 to 60 strikers were rehired and the rest of the working force was made up of replacements. *Loc. cit.* 1136-1137, 1140, par. (9) - 1141.[8] There was no charge that the strike had started as an unfair labor practice strike or had been converted into such a strike, and the trial examiner's holding (at 1141) that the employer had a right to retain permanent replacements clearly implies the finding that the strike was not an unfair practice strike. The trial examiner did not make any finding that the September 1960 refusal to bargain on merit increases had become known to the employees but held (*loc. cit.* 1143) that even assuming that this was the case it could not be held that the refusal contributed to any defection among union members. In view of the factual situation thus presented in *Midwestern Instruments*, the Companies err in the statement (Br. 41, n. 21) that the Board affirmed the trial examiner's findings concerning the assumption of employee knowledge. A more natural interpretation of the Board's approval of the trial examiner's decision is that the Board considered the trial examiner's "assumption" as dictum and affirmed only his general finding that the employer "* * * lawfully questioned the * * * Union's majority status * * *". (*Loc. cit.* at 1132).

Nor does the instant case resemble *Stoner Rubber Co.*, 123 NLRB 1440 (Co. Br. 10, 34, 54). There, the union had

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[8]The Union had been certified in June 1959, on the basis of an election won by a majority of 85 out of 305 votes cast (*loc. cit.* at 1136).

won an election by a vote of 32 to 27. After the elapse of the certification year, the union conducted an economic strike, and the employer continued its operation with 18 old employees who had crossed the picket line although the strike was still in progress and 18 permanent replacements, all of which employees the employer believed to be anti-union. Several employees had told the employer that the union no longer represented the employees (*ibid*, at 1442, 1445-1446). The Board expressly found (*ibid*, at 1446, n. 14) that the employer did not commit any unfair labor practices before the alleged refusal to bargain. "In the face of this evidence it was not unreasonable to assume that the 18 early returning strikers and 18 replacements, all of whom were crossing the picket lines, were not adherents of the union. And, it was on the basis of this evidence that the Board held the presumption of continued majority lost its force * * *." *N.L.R.B. v. John S. Swift Co.*, 302 F.2d 342, 346 (C.A. 7), distinguishing *Stoner Rubber*.

Even less in point is *Mission Manufacturing Co.*, 128 NLRB 275, 276, 289 (Br. 40, 57), where the Board declined to attribute a striking union's possible loss of majority after the certification year to the employer's unlawful exclusion of the union from the disposition of grievances filed by non-strikers and replacements who had already demonstrated dissatisfaction with the union by crossing its picket line.

3. The Companies do not discuss the authorities cited in our opening brief (pp. 15-17) establishing that the Board was entitled to treat C & C Plywood Corporation and Veneers, Inc., as one for the purpose of the Section 8(a)(5) and (1) findings. They argue instead (Br. 59-60) that the Regional Director's unit finding in the representation case, which the Companies chose to accept (see our opening brief pp. 3-4), is not conclusive on them in the present proceeding, relying on *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898. In that case the District of Columbia Circuit held at pp. 903-905 that the Board's rule against relitigation in a subsequent unfair labor practice proceeding of issues decided in a representation proceeding does not give

the employer sufficient notice that he will be disabled, regardless of the context of the subsequent proceeding, from challenging each and every issue "which was or could have been raised in the representation proceeding." The Court found that a more natural reading of the rule was that it precluded relitigation in a "related" subsequent unfair labor practice proceeding—specifically, that where the complaint in the unfair labor practice proceeding charged not a refusal to bargain (such as in the case at bar) but interference with the rights of organization, the proceedings are not so related as to foreclose presentation to the Board of the underlying issues. It thus permitted the employers to claim in the unfair labor practice proceeding which charged coercion in violation of Section 8(a)(1) that the person alleged to be guilty of coercion was not a supervisor for whose acts the employer was liable. The Court stated (at p. 904) that its holding did not cover a situation "Where a company is charged with refusal to bargain with a union certified after election" and that such a proceeding was "sufficiently 'related' to the representation proceeding to preclude litigation of such common issues *as the scope of the appropriate bargaining unit and employees therein*" (emphasis supplied.)[9]

4. The Companies' description of the Board's present practice as to employer petitions for an election to determine the majority status of a certified union (Br. 32-35) is substantially correct. However, no such petition will be acted upon where an unresolved refusal to bargain charge has been filed, and particularly where such charge, as here, resulted in the issuance of a Section 8(a)(5) and (1) complaint. See *United States Gypsum Co.*, 157 NLRB 652,

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[9]The Court (at pp. 902-903) cited *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 158, and other "early cases" for the rule that at the subsequent hearing on a charge of refusal to bargain the Board need not allow the employer to relitigate before the Trial Examiner or the Board questions concerning the unit determination previously made by the Board. See also, *N.L.R.B. v. Tennessee Packers*, 379 F.2d 172, 179 (C.A. 6) cert. denied, 389 U.S. 958, and *N.L.R.B. v. National Survey Service, Inc.*, 361 F.2d 199 (C.A. 7).

655-656, *same*, 161 NLRB No. 61, 63 LRRM 1308, 1309 fn. 3; and compare *Ward Trucking Corp.*, 160 NLRB 1190. In one of the three election proceedings cited by the Companies (Br. 34)[10] the union had filed a Section 8(a)(5) charge but withdrew it with the Regional Director's approval before entering into a consent election agreement.

The argument (Co. Br. 38-39) that the Regional Director erred in not ordering an election because of the pendency of "an unproven, actually a highly speculative unfair labor practice * * * [charge]" is insubstantial. That unfair labor practice charge was subsequently found to have merit by the Board and the Supreme Court, and to hold an election while it was pending would have violated the Board's long standing rule, approved by the courts, set out at pp. 18-20 of our opening brief. It is, of course, immaterial that the Board's ruling concerning the prior unfair labor practice had not become final, because the duty to bargain has been imposed by the statute and does not depend on the issuance of a Board order. *N.L.R.B. v. Harris-Woodson Co., Inc.*, 179 F.2d 720, 723 (C.A. 4); *L L. Majure Transport Co. v. N.L.R.B.*, 198 F.2d 735, 739 (C.A. 5); see also *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72-75.

B. The Board's Bargaining Order Is Valid and Proper

The Companies not only attack the Board's bargaining order in the present proceeding (Br. 56-61) but have the effrontery to request this Court (Br. 18, 63-64) to revise its Decree in No. 19,769, entered on August 31, 1967, pursuant to the mandate of the Supreme Court. The Board is administratively advised that the Company has not complied with the Court's decree; moreover, the entire tenor of its brief in the case at bar indicates that it is not willing to do so until the present Board order has been enforced by this Court. It is, of course, settled law that a bargaining order does not become invalid because of lapse of time since it

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[10] *Post Falls Lumber Co.*, 19 -RM- 663 (unreported).

has been issued or because of changes in the union's majority status. This holds good, *a fortiori*, where such order has been enforced by a court decree.[11] Only the propriety of the bargaining order in the case at bar merits discussion.

We submit that the decisions of the Supreme Court and this Court cited in our opening brief (p. 14-15) and not discussed by the Companies support our position that the unremedied conduct in derogation of the Union's certification justifies the bargaining order in the present case without affirmative evidence that such unlawful conduct was in fact the cause of any loss of the Union's majority. The authorities relied on by the Companies are either inapposite or have been disapproved by the Supreme Court. In *N.L.R.B. v. Logan Packing Co.*, 386 F.2d 562 (C.A. 4), the Court held (at p. 568) that the record contained no reliable evidence that the union *ever* represented a majority of the employees, and that there was no basis for rejecting the employer's claim of a good faith doubt. It further held (at p. 570) that the bargaining order was not justified by the employer's violation of Section 8(a)(1) because it found that such violations were "very minimal" and could not have destroyed the union's majority.[12]

The Companies' reliance (Br. 27, 57, 63) on *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583 (C.A. 2); *N.L.R.B. v. Superior Fireproof Door & Sash Co., Inc.*, 289 F.2d 713 (C.A. 2); and *N.L.R.B. v. Adhesive Products Corp.*, 281 F.2d 89 (C.A. 2), Friendly, C. J. dissenting at 92-93, is misplaced.

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[11] *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 566-569; *N.L.R.B. v. Crompton Highland Mills*, 337 U.S. 217, 225; *N.L.R.B. v. Pool Manufacturing Co.*, 339 U.S. 577; *N.L.R.B. v. Katz*, 369 U.S. 736, 748, n. 16.

[12] The Fourth Circuit in *Logan, supra*, and in *Crawford Mfg. Co., Inc. v. N.L.R.B.*, 386 F.2d 367, petition for cert. pending, No. 1050, Oct. Term, 1967, generally rejected the reliability of authorization cards as proof of a union's majority. No such issue is involved in the case at bar.

The court found no element indicating employer interference with employee free choice in *Marcus Trucking*, and the remand of *Adhesive Products* to the Board was based on the Board's refusal to produce a statement given by a witness (at p. 407-409). As noted by the Second Circuit in *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 181-182 (C.A. 2), cert. denied, 370 U.S. 919, "special considerations" were present in both cases. *Superior Fireproof, supra*, followed *Marcus Trucking, supra*, "* * * particularly because of the inordinate delay that characterized the course of this proceeding before the Board." This reason for making a bargaining order dependent on an election has been expressly disapproved by the Supreme Court in *N.L.R.B. v. Katz*, 369 U.S. 736, 748, n. 16, and in *Int'l Union Progressive Mine Workers v. N.L.R.B.*, 375 U.S. 396, reversing the Seventh Circuit's refusal to enforce an unconditional bargaining order because of a change in the union's bargaining status and the elapse of time since the violation (319 F.2d 428). And, in *N.L.R.B. v. Flomatic Corp.*, 347 F.2d 74 (C.A. 2) (Co. Br. 62) (Judge Hays dissenting) the union gave the employer reason to believe that it was only requesting a Board election; there was "only a minimal Section 8(a)(1) violation and no demand and refusal to bargain." *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2); see also *United Steelworkers v. N.L.R.B.*, 376 F.2d 770, 773 (C.A. D.C.),[13] cert. denied, 389 U.S. 932. The Second Circuit now uniformly follows the rule that "where section 8(a)(5) has been violated by an employer who 'has refused to bargain under circumstances in which he was under a duty to do so * * * the remedy [a bargaining order] may be thought uniquely appropriate.' [citing *Flomatic, supra*, at 79]." *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 704 (C.A. 2).

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[13] Accord: *N.L.R.B. v. Ralph Printing Co.*, 379 F.2d 687, 693 (C.A. 8). See also *Bryant Chucking Grinder Co. v. N.L.R.B.*, __ F.2d __, C.A. 2, decided December 12, 1967, 67 LRRM 2017, 2019, 2022, 56 L.C. Par. 12,344.

Philip Carey Mfg. Co. v. N.L.R.B., 331 F.2d 720 (C.A. 6), cert. denied, 379 U.S. 888 (Co. Br. 63) relied principally on *Perry Coal Co. v. N.L.R.B.*, 284 F.2d 910 (C.A. 7), cert. denied, 366 U.S. 949, which was in effect overruled by the Supreme Court in *Progressive Mine Workers, supra.* In *McLean v. N.L.R.B.*, 333 F.2d 84, 89, and in *N.L.R.B. v. H & H Plastics Mfg. Co.*, __ F.2d __, decided February 15, 1968, 67 LRRM 2572, 2576-2577, 57 LC Para. 12,490, the Sixth Circuit acknowledged the import of that decision as establishing that the Board and not the reviewing court is the proper body to assess the propriety of an unconditional bargaining order to remedy a Section 8(a)(5) violation. Accord: *N.L.R.B. v. Lifetime Door Co.*, __ F.2d __, C.A. 4, decided February 1, 1968, 67 LRRM 2704, 2706-2707, 57 LC Par. 12,543.[14]

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[14] *N.L.R.B. v. Minute Maid Corp.*, 283 F.2d 705 (C.A. 5) (Co. Br. 48, 49, 57) has been distinguished in our opening brief at p. 19, and the Court's attention has been directed to recent decisions of the Fifth Circuit holding that a bargaining order was proper where there had been no good faith bargaining during the certification year. *N.L.R.B. v. Citizens Hotel Co.*, 326 F.2d 501 (C.A. 5) (Co. Br. 62) does not avail the Company because the Court upheld the Board's finding that the employer's unilateral discontinuation of a Christmas bonus constituted a violation of Section 8(a)(5) and (1) and affirmed the cease-and-desist and bargaining portions of the Board's order. While the Court found that under the special circumstances of that case the Board's restitution order should not be enforced, no such order is involved here. (See p. 21, fn. 19 of our opening brief). *N.L.R.B. v. Dan River Mills, Inc.*, 274 F.2d 381 (C.A. 5) (Co. Br. 38, 57) involved an employer's refusal to bargain in reliance on a representation petition filed by a non-incumbent union—not, as here, by the employer itself with respect to a certified union—which led at first to a direction of election—not, as here, to an immediate dismissal. *Midwestern Instruments, Inc.*, 133 NLRB 1132 (Co. Br. 57, 64) is inapplicable for the reasons stated, *supra*, p. 8.

The Company's statement (Br. 51) that the Board has refused to issue a bargaining order in *J. P. Stevens & Co.*, 163 NLRB No. 24, 64 LRRM 1289 (not 163 No. 27, as cited by the Company), despite the finding of widespread and flagrant unfair labor practices, is correct but inapposite to the case at bar. The Board's denial of such order was based on the fact that the union in *Stevens* had not secured majority status, and the Board held that "[i]n view of the majority

CONCLUSION

For the reasons stated herein and in our opening brief it is respectfully submitted that the Board's order should be enforced in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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principle in Section 9(a) of the Act we have serious doubts that the policies of the Act require or *permit* the issuance of a bargaining order where majority status has never been attained." 64 LRRM at 1292 (Emphasis supplied.) See *Local 57 ILGWU v. N.L.R.B. (Garwin Corp.)*, 374 F.2d 295 (C.A. D.C.), cert. denied, 387 U.S. 942, and the Board's order after remand, 169 NLRB No. 154, 67 LRRM 1296.